Supreme Court, U.S.
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No. _____

06-692

In The

Supreme Court of the United States

LAURA GONZÁLEZ-VERA, *et al.*,

Petitioners,

v.

HENRY KISSINGER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. TIGAR
Counsel of Record
4801 Massachusetts Avenue, NW
Suite 206(c)
Washington, DC 20016
(202) 274-4088

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QUESTIONS PRESENTED

I. Whether the political question doctrine deprives federal courts of subject matter jurisdiction to hear claims brought by victims of murder, disappearance, and torture against an executive official alleged to be culpably complicit in these illegal acts.

II. Whether the political question doctrine shields an executive official's tortious conduct from judicial review.

PARTIES TO THE PROCEEDING

Petitioners Laura González-Vera, Jinny Arancibia, Álvaro Muñoz Marín, Carlos Reimundo Valero Vargas, Josefina Llidó Mengual, Rene Emilio Astudillo Rojas, Erika Hennings Cepeda, Germán Berger Hertz, Raúl Lorca Tobar, Gladys Marín Millie, Isolina Lucia Ramírez Ramírez, and Aaron Lloyd as personal representative of the estates of Carmelo Soria, deceased, and Freddy Taberna, deceased, sue on their own behalf and as class representatives of persons subjected to torture, persons whose loved ones were disappeared, and persons whose loved ones were wrongfully killed.

Respondents are Henry Alfred Kissinger and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Laura González-Vera, Jinny Arancibia, Álvaro Muñoz Marín, Carlos Reimundo Valero Vargas, Josefina Llidó Mengual, Rene Emilio Astudillo Rojas, Erika Hennings Cepeda, Germán Berger Hertz, Raúl Lorca Tobar, Gladys Marín Millie, Isolina Lucia Ramírez Ramírez, and Aaron Lloyd as personal representative of the estates of Carmelo Soria, deceased, and Freddy Taberna, deceased, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (Pet. App. 1-9) is reported at 449 F.3d 1260 (2006). The District Court's opinion is not reported (Pet. App. 12-35). The Court of Appeals' orders denying rehearing and rehearing *en banc* (Pet. App. 37-39) are reported at 2006 U.S. App. LEXIS 21375 (D.C. Cir. 2006) and 2006 U.S. App. LEXIS 21669 (D.C. Cir. 2006) respectively.

STATEMENT OF JURISDICTION

On June 9, 2006, the Court of Appeals affirmed the judgment of the District Court. On August 17, 2006, the Court of Appeals denied the timely petition for rehearing and rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the U.S. Constitution provides: "The judicial power shall extend to all Cases, in Laws and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."

The Alien Tort Claims Act, 28 U.S.C. § 1350 (2006), provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

In this case, the D.C. Circuit wrongly held that the political question doctrine deprives Article III courts of subject matter jurisdiction to redress claims of murder, disappearance, and torture brought against an executive official. *González-Vera v. Kissinger*, Pet. App. 1. The D.C. Circuit's application of the political question doctrine fails to comply with this Court's holding in *Baker v. Carr*, which distinguished subject matter jurisdiction from justiciability and limited the political question to prudential considerations of justiciability. 369 U.S. 186, 198 (1962). This distinction is fundamental and goes to the essence of courts' Article III duties to hear cases and controversies under the laws and treaties of the United States. Erecting a jurisdictional bar to lawsuits accusing U.S. officials of tortious conduct gives such officials protection otherwise

denied to foreign officials and entities in U.S. courts,[1] evading the discerning consideration required by qualified immunity doctrines.

The D.C. Circuit's holding is emblematic of the confusion and disarray in the lower federal courts as to the proper reach of the political question doctrine, particularly in the difficult and vitally significant realm of international human rights law. *Compare Alperin v. Vatican Bank,* 410 F.3d 532, 548 (9th Cir. 2005) (ruling that "claims for conversion, unjust enrichment, restitution, and an accounting with respect to lost and looted property are not committed to the political branches"); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (holding that the narrow tort claims of an American citizen tortured and killed during the Nicaraguan civil war were justiciable); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (noting that "[t]he department to whom this issue [adjudicating tort law] has been 'constitutionally committed' is none other than our own – the Judiciary"); *with Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (ruling that foreign policy decision-making is solely within the realm of the political branches of government); *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (concluding that plaintiffs' wrongful death and personal injury claims were nonjusticiable because they implicated foreign affairs).

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[1] *See, e.g.*, Shaw W. Scott, Note, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 Minn. L. Rev. 1497 (2005). This note chronicles the manner in which U.S. courts have addressed claims of wrongdoing, including crimes committed under the Pinochet regime. The events cited in this note show that the claims involved in this lawsuit are susceptible to judicial resolution.

This is not a case concerning broad-gauge policy issues that are beyond judicial competence. Nor would this case result in judicial invasion of decisions reserved for coordinate branches. *See generally* Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 14 n.1 (6th ed. 2002) (citing a number of scholarly treatments of the political question doctrine). Rather, adjudication of plaintiffs' claims would reinforce executive and legislative policy determinations prohibiting torture. Both domestic and international jurisprudence regarding claims of torture demonstrate the existence of judicially manageable standards. Congressional legislation and international law norms provide further evidence of judicially manageable standards, as well as the necessity for judicial intervention.

The D.C. Circuit broadly invokes the political question doctrine in a manner that fails to adhere to the discriminating analysis required by *Baker* under which courts must extricate justiciable tort claims from larger policy determinations. *See* 369 U.S. at 217 (requiring adjudication "[u]nless one of these formulations is *inextricable* from the case at bar") (emphasis added). This Court implicitly recognizes the importance of extricating justiciable claims by refusing to invoke the political question doctrine when faced with violations of statutory or constitutional rights. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (ruling that presidentially-authorized military tribunals failed to comply with domestic and international legal norms). This Court must clarify the doctrine so that the D.C. Circuit cannot preclude adjudication of the illegal acts of an executive official.

A. Factual Background

Plaintiffs and their decedents are Chilean citizens who suffered human rights violations under the Pinochet regime. Defendant Kissinger, who served as National Security Advisor and Secretary of State from 1969 to 1977, is culpably complicit in the wrongs plaintiffs suffered and in the similar harms committed against plaintiffs' decedents.

Freddy Taberna Gallegos was beaten, tortured, held incommunicado for over a month, sentenced to death by a military tribunal on false charges of treason, and executed by Chilean forces. (Compl. ¶ 103). His remains were never recovered. (*Id.*). Taberna's wife, Jinny Arancibia, was detained twice without charge and subjected to psychological torture. (*Id.*).

Carlos Reimundo Valero Vargas was taken to a detention center, where Chilean military police beat him repeatedly with the butt of a gun, threatened him with death, and pretended to shoot him over a period of two days. (*Id.* ¶ 101). They subsequently moved Valero to the Chilean and National Stadiums. (*Id.*). Agents of the National Defense Intelligence Agency (DINA) tortured him physically and psychologically and forced him to witness the torture of other individuals. (*Id.*). Valero also learned that his friends and acquaintances had been tortured and killed. (*Id.*). Valero continues to suffer from depression as a result of the trauma inflicted by the DINA. (*Id.*).

Enrique Astudillo Álvarez and his sons, Omar Astudillo Rojas and Ramón Astudillo Rojas, were detained by the Chilean military police. (*Id.* ¶ 82). The police tied the men's hands behind their backs, beat them, insulted them, and threatened them with death. (*Id.*). The men's bodies

were found five years later in a mass grave in an abandoned oven at a limestone mine. (*Id.*). Their family considers them missing because their remains have not been recovered and returned for a proper burial. (*Id.*).

Carlos Berger Guralnik was abducted by DINA agents as a part of their "Caravan of Death." (*Id.* ¶ 88). Over a 15 day period, the Caravan of Death moved from one town to another, removing political prisoners and executing them. (*Id.*). Berger and 74 other victims were tortured, stabbed, shot, and killed by DINA agents. Like many others, Berger's body has never been found. (*Id.*).

DINA agents took Alfonso Chanfreau Oyarce to a Santiago detention and torture center. (*Id.* ¶ 85). The next day, Chanfreau's wife, Erika Hennings Cepeda was blindfolded and taken to the same center. (*Id.*). For the next 13 days, agents tortured the couple in front of each other. (*Id.*). Hennings was raped and tortured with electricity in front of her husband. (*Id.*). Chanfreau was tortured daily for hours at a time. (*Id.*). He was also taken to Villa Grimaldi, the headquarters of the DINA's metropolitan brigade, for further torture. (*Id.*). Hennings was eventually released, but Chanfreau remains missing. (*Id.*).

Father Antonio Llidó Mengual was detained and taken to the José Domingo Cañas Detention Center where he was severely beaten and given electrical shocks for several hours at a time. (*Id.* ¶ 79). Father Llidó has been missing since October 1974. (*Id.*).

Carlos Enrique Lorca Tobar, a respected doctor and a Chilean congressman, was abducted by DINA agents during a political party meeting. (*Id.* ¶ 91). The agents handcuffed Lorca, removed his glasses, and dragged him to Villa Grimaldi, where they abused him so severely that

they broke two of his limbs. (*Id.*). According to a 2001 declaration by the Chilean government, Lorca's body was tossed into the sea. (*Id.*). Lorca's brother has no evidence that this is true and believes that Lorca is still disappeared. (*Id.*).

Jorge Muñoz Poutays and Mario Zamorano Donoso were tortured and disappeared as part of a DINA plot to exterminate members of the Central Committee of the Communist Party. (*Id.* ¶¶ 94, 98). DINA agents first trapped and tortured the host of the meeting and his family. (*Id.* ¶ 94). The agents kept the family imprisoned in their home. (*Id.*). As political party members arrived for the meeting, DINA agents arrested and detained them. (*Id.*). The agents shot Zamorano in the leg as soon as he entered the house and took him to an undisclosed location. (*Id.* ¶ 98). Muñoz was taken to Villa Grimaldi. (*Id.* ¶ 94). Both Zamorano and Muñoz are still disappeared. (*Id.* ¶¶ 94, 98).

Carmelo Soria Espinoza was kidnapped by members of the DINA. (*Id.* ¶ 75). These agents took Soria's car and drove him to the home of Michael Vernon Townley. (*Id.*). Soria was tortured and killed. DINA agents subsequently threw Soria's body into his car and pushed it down a ravine. (*Id.*).

Henry Kissinger's culpable participation in the described events extends over a period of years. (*Id.* ¶ 42). Defendant Kissinger had repeatedly been warned that his actions and the actions of his accomplices would cause thousands of wrongful deaths. (*Id.* ¶¶ 45-46, 57-58). He established secret contacts with known terrorists and provided them with encouragement, monetary support, and weapons. (*Id.* ¶¶ 43, 47). Despite his knowledge of the

multitude of tortures and disappearances following the military coup, defendant Kissinger continued to support and fund the DINA's unlawful actions. (*Id.* ¶¶ 63-65, 69). Publicly, he expressed an official policy supporting human rights. (*Id.* ¶ 74). Privately, he pledged support for General Pinochet's actions and assured him that there would be no interference from the U.S. government. (*Id.*).

Defendant Kissinger's conduct was in violation of congressionally-declared policy. For example, Congress enacted the Foreign Assistance Act of 1974 to address covert CIA funding of repressive regimes in the Western Hemisphere. *See* Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (*codified as amended at* 22 U.S.C. § 2422 (1988)) (*superseded by* Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, § 407(a), 94 Stat. 1975, 1981 (Oct. 14, 1980)) (directing that "[n]o funds . . . may be expended by . . . the Central Intelligence Agency for operations in foreign countries, other than [those] intended solely for obtaining necessary intelligence, unless the President [makes specified findings and reports to congressional committees]"). The Complaint alleges facts that, if true, support the proposition that defendant Kissinger aided and abetted the wrongful actions that led to plaintiffs' injuries.

B. Procedural Background

On November 13, 2002, plaintiffs Laura González-Vera, Jinny Arancibia, Álvaro Muñoz Marín, Carlos Reimundo Valero Vargas, Josefina Llidó Mengual, Rene Emilio Astudillo Rojas, Erika Hennings Cepeda, Germán Berger Hertz, Raúl Lorca Tobar, Gladys Marín Millie, Isolina Lucia Ramírez Ramírez, and Carol Mitchell filed a

Complaint alleging Forced Disappearance; Torture; Cruel, Inhuman or Degrading Treatment; Crimes Against Humanity; Summary Execution; Violence Against Women; Arbitrary Detention; False Imprisonment; Wrongful Death; Assault and Battery; and Intentional Infliction of Emotional Distress in the United States District Court for the District of Columbia against defendants Henry Alfred Kissinger, Michael Vernon Townley, and the United States. On February 28, 2003, the U.S. Attorney General certified that defendant Kissinger acted within the scope of his employment and substituted the United States as a defendant in the case pursuant to the *Westfall* Act. On November 23, 2005, District Judge Henry H. Kennedy, Jr. entered a default judgment against Michael Vernon Townley in the amount of $7,259,700. *See* Order for Default Judgment Against Defendant Michael Vernon Townley, CV 02-02240.

On February 28, 2003, defendants Kissinger and the United States of America submitted a Motion to Dismiss Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The District Court issued its memorandum opinion dismissing plaintiffs' claims against defendants Kissinger and the United States on September 17, 2004. *González-Vera v. Kissinger,* Pet. App. 12. Ruling on the merits, the District Court held that (1) sovereign immunity barred plaintiffs' claims against the United States and (2) the *Westfall* Act provided immunity to defendant Kissinger notwithstanding plaintiffs' Alien Tort Claims Act and Torture Victim Protection Act claims. *Id.* The District Court refused to dismiss the claims based on the political question doctrine because of its murky and unsettled nature. *Id.* at 18-20.

Plaintiffs appealed the dismissal of their claims against defendants Kissinger and the United States to the

United States Court of Appeals for the District of Columbia Circuit and argued that judicial review extends to illegal executive actions. On June 9, 2006, the Court of Appeals affirmed the District Court's dismissal on different grounds, finding that plaintiffs' claims constituted a nonjusticiable political question. *González-Vera*, Pet. App. 9 (stating that "the plaintiffs were unable to extricate their [Torture Victim Protection Act] claims from the political question that permeates their complaint").

Plaintiffs filed a timely petition for rehearing and rehearing *en banc* on July 21, 2006, arguing that the political question does not bar claims that implicate the illegal actions of executive officials and that courts cannot broadly invoke the political question doctrine to preclude subject matter jurisdiction. The petition was denied on August 17, 2006. Pet. App. 37-39.

REASONS FOR GRANTING THE PETITION

I. THE D.C. CIRCUIT IMPROPERLY INVOKED THE POLITICAL QUESTION DOCTRINE TO LIMIT ARTICLE III SUBJECT MATTER JURISDICTION

Professors Wright and Kane have stated that "[n]o branch of law of justiciabilty is in such disarray as the doctrine of the 'political question.'" *See* Wright & Kane, *Law of Federal Courts* at § 14. The D.C. Circuit, relying uncritically on dicta from this Court and ignoring the *Baker v. Carr* holding, held that the political question doctrine is an affirmative limit on the subject matter jurisdiction granted by Article III of the Constitution and confirmed by 28 U.S.C. § 1331 (2006). *See González-Vera*,

Pet. App. 5 (stating, "the doctrine is a jurisdictional limitation[] imposed upon federal courts by the case or controversy requirement of Art[icle] III; hence the presence of a political question . . . prevent[s] the power of the federal judiciary from being invoked by the complaining party.") (internal quotation marks and citations omitted).

This Court recently noted that "profligate" use of subject matter jurisdiction has serious procedural consequences and is not a merely technical error. *See Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1242-43 (2006) (emphasizing the need for precise use of jurisdictional dismissals due to the possibility of improper precedential use). This case provides an opportunity to clarify confusing dicta[2] and reaffirm the Judiciary's duty to hear cases and controversies under Article III of the Constitution. Although respondents may argue that they are shielded by immunity and that the jurisdiction question is therefore irrelevant, clarification of the political question doctrine is nonetheless of vital importance because it affects the most basic constitutional issue of federal courts' power.

Baker v. Carr clearly presented the distinction between subject matter jurisdiction and justiciability, a teaching that the D.C. Circuit has ignored.[3] In *Baker*, the

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[2] In *Arbaugh*, this Court cited examples of confusing dicta resulting from careless invocation of subject matter jurisdiction: *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004); *Scarborough v. Principi*, 541 U.S. 401, 414 (2004); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998); *Carlisle v. United States*, 517 U.S. 416, 434-35, (1996) (Ginsburg, J., concurring); *United States v. Robinson*, 361 U.S. 220, 229 (1960). 126 S. Ct. at 1242.

[3] The D.C. Circuit has barred other lawsuits brought to redress torture. *E.g., Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006);

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appellate decision under review held that the court lacked "jurisdiction of the subject matter" and that the matter was not justiciable. 396 U.S. at 188. This Court subsequently held that there was subject matter jurisdiction because the issue of representation arises under the Constitution. Courts similarly possess subject matter jurisdiction over the wrongs plaintiffs have suffered based on the Alien Tort Claims Act and other laws described in the Complaint. *See Baker*, 396 U.S. at 198-201; *see also Marshall v. Marshall*, 126 S. Ct. 1735, 1741 (2006) (asserting, "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.") (internal quotation marks and citations omitted). Only after holding that subject matter jurisdiction exists can the courts embark on the political question analysis. *See Baker*, 369 U.S. at 204, 208.

The D.C. Circuit's jurisdictional analysis also creates inconsistency and procedural confusion by conflating merits and jurisdictional issues in violation of this Court's teaching. In *Steel Co. v. Citizens for a Better Environment*, this Court made clear the primacy of subject matter jurisdiction determinations. 523 U.S. 83 (1998); *see also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 Wash. L. Rev. 643, 693 (2005) (stating, "A federal court should look to the appropriate positive-law provision at the appropriate phase of the litigation process. That means resolving jurisdiction first, according to the jurisdiction-granting

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Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768 (2006).

statutory language, before even peeking at the factual specifics of the plaintiff's federal cause of action.").

The D.C. Circuit's opinion in this case is internally inconsistent because it recognizes that plaintiffs' claims are justiciable in certain circumstances. The court said, "To be sure, we can imagine a case in which a rogue agent commits an act so removed from his official duties that it cannot fairly be said to represent the policy of the United States, but this is not such a case." *González-Vera*, Pet. App. 8. The D.C. Circuit's recognition of potentially justiciable claims against rogue agents and denial of similar claims against an executive official demonstrates that the dismissal was not properly classified as a subject matter jurisdiction determination. Whether this is "such a case" that merits adjudication can only be decided after adversary inquiry, not on the basis of the Complaint's allegations and in the absence of discovery. Because "rogue agent" implies culpable intent and speaks to litigable immunity questions, adjudication of these claims depends on the discovery process, not on a determination of subject matter jurisdiction.

The D.C. Circuit has shown that these issues are litigable with regard to individual defendants. One co-defendant, Michael Vernon Townley, failed to answer the Complaint. The District Court entered a default judgment against him,[4] which neither the United States nor Townley has ever challenged. Townley was a Chilean secret police agent who was instrumental in murders committed in

[4] *See* Order for Default Judgment Against Defendant Michael Vernon Townley, CV 02-02240 (entering a default judgment against Michael Vernon Townley for $7,259,700).

Washington, D.C., on the orders of the junta. *See Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984). Townley's complicity presents issues of fact and law no more or less difficult than defendant Kissinger's.

II. PLAINTIFFS' CLAIMS ARE JUSTICIABLE BECAUSE THIS CASE DOES NOT THREATEN EXECUTIVE POLICY DETERMINATIONS AND JUDICIALLY MANAGEABLE STANDARDS EXIST

The D.C. Circuit failed to recognize that a narrowly drawn Complaint of culpable complicity is the proper business of Article III courts. Although *Baker* speaks of deference to the Executive in cases implicating foreign affairs, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211. *Baker* addressed the domestic issue of representation in the context of federalism and not the separation of powers. This Court's treatment of foreign relations and other separation of powers issues was by way of analysis. The issues presented in this case – tortious conduct by an executive officer arising in a foreign country – have not received any detailed attention from this Court in the post-*Baker* era.[5]

[5] For discussion of the entire sweep of this Court's political question jurisprudence, see articles cited in Wright & Kane, *Law of Federal Courts* at § 14 n.1.

A. This Case Poses No Risk Of Embarrassment To Coordinate Branches

The *Baker* Court spoke of the need for a "single-voiced statement of the Government's views" in certain foreign relations settings. *Id.* at 211. In this case, the government acted with a single voice in its condemnation of torture, while defendant Kissinger privately supported known torturers. Courts will not embarrass coordinate branches of government in adjudicating plaintiffs' claims because the government has already condemned publicly U.S. actions in Chile. *See* U.S. Dep't of State, Freedom of Information Act, *Hinchey Report* (Sept. 18, 2000), *available at* http://foia.state.gov/Reports/HincheyReport.asp (concluding that because of the actions in Chile "the CIA now carefully reviews all contacts for potential involvement in human rights abuses . . . These standards . . . would likely have altered the amount of contact we had with perpetrators of human rights violators [sic] in Chile had they been in effect at that time.").

In addition, U.S. executive officials have claimed that torture has never been a part of U.S. foreign policy. Condoleezza Rice, U.S. Sec'y of State, *Remarks Upon her Departure for Europe* (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57602.htm (stating, "The United States Government does not authorize or condone torture. . . . Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world."); BBC News, *U.S. Does Not Torture, Bush Insists* (Nov. 7, 2005), http://news.bbc.co.uk/2/hi/americas/4415132.stm (acknowledging that President Bush has claimed that the United States does not torture). Where Congress has legislated and the Executive has spoken, courts can adjudicate plaintiffs' claims while respecting the separation of powers.

B. Domestic And International Case Law Concerning Torture Are Evidence Of Judicially Manageable Standards

U.S. courts routinely address claims of torture, specifically under the Torture Victim Protection Act (TVPA) and the Alien Tort Claims Act (ATCA). *See Sosa v. Alvarez Machain*, 542 U.S. 692, 728 (2004) (concluding that the TVPA "'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing") (internal citations omitted); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1153-56 (11th Cir. 2005) (permitting equitable tolling for claims against a former Chilean military officer that alleged torture; extrajudicial killing; crimes against humanity; and cruel, inhuman, or degrading treatment under the TVPA); *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (condemning acts of torture as violations of non-derogable international norms); *see also Sarei v. Rio Tinto, PLC.*, 456 F.3d 1069, 1078 (9th Cir. 2006) (holding that claims of "war crimes, violations of the laws of war, [and] racial discrimination . . . all implicate 'specific, universal and obligatory norm[s] of international law' that properly form the basis for ATCA claims") (internal citations omitted); *Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006) (affirming a $54,600,000 judgment for Salvadoran refugees who brought suit under the TVPA and the ATCA alleging claims of torture against former Salvadoran military officials).

International courts also commonly adjudicate claims of torture implicating government officials. *See Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Appeal Judgment (July 9, 2004) (upholding a sentence of life imprisonment for Rwanda's Minister of Information for his direct and public incitement to commit genocide); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment (July 31, 2003)

(holding the President of the Municipal Assembly and head of the Prijedor Municipal Council for National Defense liable for the torture and murder of prisoners in various detention facilities under his control). *See generally Chahal v. The United Kingdom*, 23 Eur. Ct. H.R. 413 (1997) (holding that the prohibition on torture is absolute and that allegations of a national security risk are immaterial to a determination of whether an individual faces a risk of torture if returned to their country of nationality); *Velásquez-Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) (stating that "[a]n illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required").

The only difference between the multitude of domestic and international cases addressing claims of torture and this case is that defendant Kissinger is an American official whose actions are being challenged in an American court, while most of the cases cited above involve officials summoned to answer in courts outside their own country. In all the aforementioned cases, there were no doubt "political reasons" for torturing individuals. Torture and other crimes committed by state actors inevitably possess such a political element. Nonetheless, this political element has not deterred tribunals around the world from adjudicating such claims.

C. Congressional Legislation Provides Evidence Of Judicially Manageable Standards And Mandates Judicial Review When An Executive Officer Acts Outside Constitutional And Congressionally-Determined Limits

Congressional legislation reaffirms the United States' prohibition against torture and provides judicially manageable standards. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (*codified at* 28 U.S.C. § 1350 (note) (2006)); 18 U.S.C. §§ 2340-2340A (2006) [Torture Statute] (codifying the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001-1003, 119 Stat. 2680, 2739-40 [McCain Amendment]. This legislation does not create new standards, but rather codifies existing ones, as Congress itself has acknowledged recently in the Military Commissions Act of 2006. *See* Pub. L. No. 109-366, § 950p, 120 Stat. 2600, 2624 (recognizing, "This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission."). Defendant Kissinger's culpable complicity in the murder, disappearance, and torture of plaintiffs violates these legislative prohibitions against torture.

Defendant Kissinger also acted contrary to congressional limitations on covert activities. While defendant Kissinger held the position of Secretary of State, Congress constrained the Executive's ability to fund operations abroad despite heightened political tensions between the United States and other countries in the Western Hemisphere. *See* Foreign Assistance Act of 1974 § 32. Plaintiffs' claims demonstrate that defendant Kissinger failed to

receive express congressional authority when he continued to provide tactical financial assistance to the DINA outside of the normal chains of command. (Compl. ¶¶ 42, 65, 67, 72, 74).

Mindful of the separation of powers doctrine, this Court has restrained the authority of the Executive when it encroaches upon the powers of coordinate branches of government. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (stating, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). Although *Youngstown* is not expressly a "political question" case, it states important principles relevant to analysis of the political question doctrine when faced with legislation prohibiting certain conduct.

Hamdan v. Rumsfeld reaffirmed this Court's decision in *Youngstown*. 126 S. Ct. at 2774 n.23 (stating that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."); *see also Rasul v. Bush*, 542 U.S. 466, 487 (2004) (stating that "there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."). *Youngstown* and *Hamdan* emphasize the Judiciary's duty to ensure that coordinate branches of government comply with the requirements of the Constitution. *See I.N.S. v. Chadha*, 462 U.S. 919, 941-42 (1983) (concluding, "[N]o policy

underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.").

Defendant Kissinger's express and implied powers as National Security Adviser and Secretary of State counsel for and not against judicial review. Courts will review the conduct of a Cabinet officer that trespasses on individual rights to determine whether it was expressly authorized. *See Kent v. Dulles*, 357 U.S. 116, 129 (1958) (finding that the Secretary of State did not have the authority to promulgate regulations denying citizens passports because courts should "construe narrowly all delegated powers that curtail or dilute" individual rights); *see also Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970) (holding that judicial review beyond that expressly granted by Congress was appropriate where an executive agency exceeded its statutory mandate under the Selective Service Act of 1967); *Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) (applying this Court's reasoning in *Kent* to limit "punitive sanctions apart from the criminal prosecutions specifically authorized" under the Selective Service System).

Defendant Kissinger's actions violated congressional statutes and exemplify an abuse of executive power that mandates judicial intervention. Allowing plaintiffs' claims to go unheard violates this country's commitment to justice. This Court acknowledged an obligation to safeguard individual interests in *Rasul*, stating that "there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." 542 U.S. at 487 (Kennedy, J., concurring).

D. International Law Norms That Protect Civilians Against Terrorism Are Both Fundamental And Judicially-Enforceable

The abundant law of treaties shows that standards of conduct prohibiting torture are judicially manageable and devised to restrain and at times punish the conduct of state actors, as well as provide redress to their victims. No individual anywhere in the world doubts that such standards exist and must be enforced in some manner.

The Geneva Conventions are treaties within the meaning of the Constitution and are enforceable in U.S. courts. *See Hamdan*, 126 S. Ct. at 2802 (concluding, "[Common Article 3] is part of a treaty the United States has ratified and thus accepted as binding law."); *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (stating, "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."). Violations of human rights are justiciable in U.S. courts because treaties are a part of the laws of the United States.

The Geneva Conventions prohibit "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] outrages upon personal dignity, in particular humiliating and degrading treatment." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The Fourth Geneva Convention further specifies that civilians may not be targeted because of their political beliefs. *Id.* at art. 27 (protecting civilians "against all acts of violence or threats thereof . . . without adverse distinction based, in particular, on . . .

political opinion."). Defendant Kissinger's support of the torture of civilians based on their political beliefs contradicts these prohibitions.

The Geneva Conventions underscore the distinction between civilian and military personnel.[6] Attacks against civilians are never a justified political action and are separable from the claims the political question doctrine seeks to protect. *See In re Yamashita*, 327 U.S. 1, 14 (1946) (holding that "acts directed against the civilian population . . . are recognized in international law as violations of the law of war."); *Quirin*, 317 U.S. at 30-31 (concluding, "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations"). The political context of an act does not attach to the violent act itself to relieve the perpetrator of accountability. *See Ornelas v. Ruiz*, 161 U.S. 502, 511-12 (1896) (holding that a perpetrator's political intentions do not exempt him from responsibility for "acts which contained all the characteristics of crimes under the ordinary law").

Not only are states bound to respect international humanitarian law, but they are required to ensure respect for it. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1 (stating, "The High

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[6] The D.C. Circuit failed to recognize this distinction when it ruled that *Schneider* controlled this case. *See González-Vera*, Pet. App. 5 (citing *Schneider*, 412 F.3d 190) (outlining facial factual similarities between the cases while neglecting to mention the distinction between military and civilian targets). In *Schneider*, the victim was a military general; in this case, Kissinger unlawfully attacked civilians. This is a clear "cognizable factual distinction" crucial to proper analysis of plaintiffs' claims of human rights abuses. *See González-Vera*, Pet. App. 9.

Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."). Judicial review by Article III courts is a crucial part of satisfying the obligation to ensure adherence to U.S. treaty obligations. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (recognizing that "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). U.S. courts have recognized this duty to interpret and apply international treaties. *See, e.g.*, *Breard v. Greene*, 523 U.S. 371, 375 (1998) (holding that implementation of the Vienna Convention on Consular Relations is governed by the procedural rules of the forum state); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (holding that the Vienna Convention on Diplomatic Relations imposes the duty of protecting embassy grounds on the United States as a host nation).

International human rights agreements also prohibit torture universally. *See* International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171 (stating, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) (stating, "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st

plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (stating, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *see also Sosa*, 542 U.S. at 732 (concluding, "[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted.").

Executive officials have a binding duty to uphold human rights obligations set forth in treaties and other international instruments. *See Hamdan*, 126 S. Ct. at 2802 (noting that Article 3 Common to the Geneva Conventions is accepted as binding law because it is part of a treaty that the United States ratified). The Geneva Conventions place clear obligations on state officials to refrain from committing acts of torture; Article III courts have a duty to ensure that they are upheld. As noted by this Court in *Hamdan*, Congress recognized the binding nature of the Geneva Conventions, and in particular the importance of Common Article 3 regarding civilians, when it included violations of Common Article 3 as actionable war crimes. *See Hamdan*, 126 S. Ct. at 2802 (stating that Common Article 3 "is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan"); War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (*codified at* 18 U.S.C. § 2441 (2006)) (*amended by* Military Commissions Act of 2006 § 6) (defining a war crime as any conduct that "constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949"). This Court's precedent shows that the Judiciary is obligated to uphold international standards prohibiting

torture and requires resolution of plaintiffs' claims against defendant Kissinger.

III. THE POLITICAL QUESTION DOCTRINE DOES NOT SHIELD AN EXECUTIVE OFFICIAL'S TORTIOUS CONDUCT

The D.C. Circuit broadly invoked the political question doctrine to preclude adjudication of an executive official's tortious conduct. This application of the political question doctrine fails to recognize the *Baker* Court's determination that the doctrine applies only to those claims that are inextricable from executive policy. This Court has recognized that tort claims are extricable from larger policy concerns and has heard many cases involving executive "political" action without mention of the political question doctrine. Lower courts must heed this Court's limitations on the political question doctrine and must hear claims that involve violations of a statute, even when such claims occur within a political context, to respect the separation of powers.

The discretionary political question doctrine prevents courts from interfering with the constitutionally-delegated powers of coordinate branches of government in limited circumstances. *See Baker*, 369 U.S. at 212-13 (recognizing that the political question doctrine can preclude judicial review in limited areas of foreign affairs, such as the termination of a treaty, recognition of foreign governments, recognition of belligerency abroad, and determination of an individual's status as representative of a foreign government). This Court held in *Baker* that the political question doctrine is a function of the separation of powers designed to prevent judicial interference in actions that are uniquely committed to coordinate branches of government.

See id. at 210 (concluding, "The nonjusticiability of a political question is primarily a function of the separation of powers."); *see also Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (stating that a question of sovereignty is "not a judicial, but is a political question") (internal citations omitted). The political question doctrine, for example, empowers the Executive to recognize foreign governments without judicial interference. *See United States v. Pink*, 315 U.S. 203, 233 (1942) (acknowledging that the Executive has the sole power to recognize a foreign government). In these limited situations, judicial interference would "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

Although the political question doctrine insulates the Executive's diplomatic foreign affairs decisions from judicial intervention, it does not provide authority for illegal actions. *See Youngstown*, 343 U.S. at 637 (concluding that "[w]hen the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely upon his own constitutional powers minus any constitutional powers of Congress over the matter."). The political question doctrine was never meant to deny federal courts the ability to adjudicate claims of tortious conduct of executive officials. *See Baker*, 369 U.S. at 211 (recognizing that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). The D.C. Circuit's use of the political question doctrine to preclude adjudication of claims of murder, disappearance, and torture threatens the separation of powers by limiting

the courts' Article III power to adjudicate cases and controversies under the laws of the United States.

The political question doctrine is discretionary precisely because certain claims are separable from policy. Courts are obligated to determine on a case-by-case basis which claims are justiciable. *See id.* (noting that "[o]ur cases in this field seem invariably to show a discriminating analysis of the particular question posed"). The D.C. Circuit failed to provide a case-by-case analysis that would have properly exacted plaintiffs' tort claims from larger policy determinations, instead dismissing all claims that the government has characterized as part of U.S. policy. *See González-Vera*, Pet. App. 1 (reasoning that the political context of the case rendered resolution of the tort claims nonjusticiable while failing to conduct a thorough inquiry into the merits of the claims). This reasoning fails to adhere to the requirements detailed in *Baker* that limit the discretionary political doctrine "[u]nless one of these formulations is *inextricable* from the case at bar." 369 U.S. at 217 (emphasis added).

This case is not about foreign policy, but rather the limits imposed by domestic and international law. This Court has commonly addressed claims that implicate the foreign affairs power of the Executive without mention of the political question doctrine. *See Hamdan*, 126 S. Ct. 2749 (holding that a military commission authorized by the President violated the Uniform Code of Military Justice and the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (recognizing the due process rights of an individual to challenge his status as a so-called enemy combatant in the "war on terror"); *Rasul v. Bush*, 542 U.S. 466 (2004) (demonstrating that federal courts have jurisdiction to review the conditions of detainment of so-called

enemy combatants). Even when faced with threats upon U.S. national security during the "war on terror," this Court has found that the Executive is bound by the rule of law. *See Hamdan*, 126 S. Ct. at 2786 (finding that military commissions must be in "compliance not only with the American common law of war, but also with the rest of the UCMJ itself[,]" as well as the "'rules and precepts of the law of nations,' . . . including, *inter alia,* the four Geneva Conventions") (internal citations omitted). These cases demonstrate that the power of the Judiciary remains undiminished when an Executive official acts in violation of domestic and international law.

Violations of statutes conferring jurisdiction and a cause of action warrant adjudication by the courts. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 330 (1986) (holding that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."). Even within a military context, statutes confer a duty on the Judiciary to hear certain claims. *See Rasul*, 542 U.S. at 484-85 (stating, "28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims."). More specifically, U.S. courts are obligated to adjudicate claims of torture under the TVPA. *See Sosa*, 542 U.S. at 728 (stating that a clear mandate exists for adjudicating claims of torture). Defendant Kissinger's culpable complicity in the murder, disappearance, and torture of plaintiffs and their families

violates congressional legislation. The lower court must comply with its statutory duty to adjudicate these claims.

The political question doctrine should not encompass any and all actions that are deemed "political" in nature. If the courts are barred from adjudicating all political cases, the Judiciary becomes subservient to the Executive. In *Powell v. McCormack*, this Court held that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." 395 U.S. 486, 549 (1969). This Court refused to invoke the political question doctrine because it is the Judiciary's proper role to interpret the Constitution, even when its decisions conflict with other branches of government. *See id.* at 548 (stating that the "'textual commitment' formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims").

The political question doctrine is a judicially created doctrine that only indirectly derives from the Constitution. Its application is appropriate in limited circumstances when adjudication of claims would inherently undermine the separate powers delegated to coordinate branches of government. In this case, however, Congress has expressly prohibited torture and provided manageable standards for resolution of these claims through its enactment of the Torture Victim Protection Act. Applying the political question doctrine to bar claims of torture precludes congressionally-mandated judicial review, thereby threatening the separation of powers.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant this petition.

Respectfully submitted,

MICHAEL E. TIGAR[7]
Counsel of Record
4801 Massachusetts Avenue, NW
Suite 206(c)
Washington, DC 20016
(202) 274-4088

[7] The litigation for which this petition has been filed is the work of the following students in the UNROW Human Rights Impact Litigation Clinic of the American University Washington College of Law under the direction of Professors Michael E. Tigar and Ali Beydoun: Sebastian Amar, Tara Eliza Castillo, Marialejandra del-Cerro, Andrew Gibbs, Jodi Newman, Erin Louise Palmer, Emily Strunk, and Shirley Woodward.

449 F.3d 1260

United States Court of Appeals,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 27, 2006 Decided June 9, 2006

No. 05-5017

LAURA GONZALEZ-VERA, ET AL.,
APPELLANTS

v.

HENRY ALFRED KISSINGER, IN HIS INDIVIDUAL CAPACITY AND AS NATIONAL SECURITY ADVISOR AND SECRETARY OF STATE, ET AL.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 02cv02240)

Aaron Lloyd, Student Counsel, argued the cause for appellants. With him on the brief was *Michael E. Tigar*, *Ali A. Beydoun, Christine Parsadaian, Courtney J. Nogar, Debra L. Spinelli-Hays, James B. Cowden, Karen Corrie, Laura Rotolo, Melissa Mandor*, and *Timothy L. Foden* entered appearances.

William H. Goodman and *Jennifer M. Green* were on the brief for *amicus curiae* Center for Constitutional Rights in support of appellants.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were

Gregory G. Katsas, Acting Assistant Attorney General, *Kenneth L. Wainstein*, U.S. Attorney, and *Barbara L. Herwig*, Assistant Director.

Before: GINSBURG, Chief Judge, and ROGERS and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: The plaintiff-appellants sued the United States and former Secretary of State and National Security Advisor, Dr. Henry A. Kissinger, seeking damages for actions allegedly taken in support of the Pinochet regime in Chile 30-odd years ago. The district court held the plaintiffs' claims justiciable but dismissed the suit on the grounds that the United States had not waived its sovereign immunity and the plaintiffs had failed to state a claim upon which relief can be granted against Dr. Kissinger. We affirm the judgment of dismissal but do so on the ground that the plaintiffs' claims present a nonjusticiable political question.

I. Background

In September 1973 Chilean military officers staged a coup d'état, ousting the elected President, Salvador Allende, and installing Augusto Pinochet as chairman of the newly formed military junta. The plaintiffs allege the Chilean Directorate of National Intelligence (DINA) thereafter "brutal[ly] repress[ed]" and attempted "to eliminate" individuals opposed to Pinochet's regime. Complaint ¶ 60. They further claim "the United States and/or Henry Kissinger funded, assisted, . . . aided and abetted, . . . acted jointly and conspired with known human rights violators" in the "Chilean terror apparatus"

to violate the human rights of the plaintiffs and their relatives. *Id.* ¶ 2. In particular, the plaintiffs allege Kissinger "purposefully act[ed] outside the proper channels of Congressional oversight of covert operations" to assist and establish contacts with known terrorists and "authorized" the CIA to assist the military regime. *Id.* ¶¶ 43, 65, 69.

After the release of a report from the United States Department of State suggesting Kissinger was aware of human rights violations committed by the DINA, *see* Hinchey Report on CIA Activities in Chile (Sept. 18, 2001), *available at* http://foia.state.gov/Reports/HincheyReport.asp, the plaintiffs brought suit against the United States and Kissinger under the Alien Tort Statute (ATS), 28 U.S.C. § 1350; the Torture Victim Protection Act (TVPA), *id.* § 1350 note; the common law; and customary international law. Compl. ¶ 10. They sought relief for, among other things, torture, false imprisonment, wrongful death, and intentional infliction of emotional distress. *Id.* ¶¶ 115, 152, 163, 175-76.

The United States moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the complaint for lack of subject matter jurisdiction because it raised a political question and, in the alternative, under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The plaintiffs argued the case was justiciable and they had stated "cognizable claims" against both the United States and Kissinger. The district court, terming it a "close" call whether the claims were justiciable, ultimately held the political question doctrine was inapplicable. Ruling on the merits, the court held (1) the claims against the United States were barred by sovereign immunity and, (2) because Kissinger had acted within the scope of his employment, the Westfall Act barred all but possibly the TVPA

claim against him, *see* 28 U.S.C. § 2679(b)(1). Assuming *arguendo* that the Westfall Act did not bar the TVPA claim against Kissinger, *see id.* § 2679(b)(2)(B) (allowing suit "for a violation of a statute of the United States under which such action against an individual is otherwise authorized"), the district court held the plaintiffs had failed to state a claim under that Act because they did not allege Kissinger had acted under color of foreign law. *See id.* § 1350 note.

II. Analysis

The plaintiffs ask us to reverse the judgment of the district court on the grounds that (1) sovereign immunity does not bar their claims against the United States; (2) they were entitled to discovery in order to demonstrate Kissinger was not acting within the scope of his employment; (3) the Westfall Act does not bar their claim under the ATS; and (4) they have stated a claim under the TVPA. The Government first argues the case is nonjusticiable under the political question doctrine and, in the alternative, defends the judgment of the district court on the merits.

A. Order of Decision

At the outset, the plaintiffs "question whether [the United States is] procedurally barred from raising th[e] issue" of justiciability because it did not cross-appeal the district court's refusal to apply the political question doctrine. Because "Rule 12(b)(6) is a threshold procedural requirement that cannot include a determination of the merits of a claim," the plaintiffs maintain the Government

has "improperly" asked this court "to consider justiciability prior to analyzing the District Court's dismissal."

The plaintiffs mistake the nature of our inquiry. A dismissal based upon the political question doctrine is not an adjudication on the merits. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 47 (D.C. Cir. 2005). Rather, the doctrine is a "jurisdictional limitation[] imposed upon federal courts by the 'case or controversy' requirement of Art[icle] III"; hence "the presence of a political question . . . prevent[s] the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974); *accord Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006). It follows that regardless whether the Government has raised the issue – in a timely or an untimely manner or not at all – we must consider whether the plaintiffs' claims present a political question lest the court invade the province of the political branches. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

B. Application of the Political Question Doctrine

The United States argues our decision in *Schneider v. Kissinger*, 412 F.3d 190 (2005), controls this case, rendering all the plaintiffs' claims nonjusticiable. Specifically, the Government argues the claims are nonjusticiable because they would require the court to pass judgment on a matter of foreign policy and national security, which subjects are "textually committed to the political branches," *id.* at 194. Alternatively, the Government argues "there are no judicially discoverable and manageable standards to apply to the claims here," thus precluding any role for the judiciary. The Government also contends our recent

decision in *Bancoult v. McNamara* "fully supports application of the political question doctrine" in this case.

The plaintiffs distinguish *Schneider* as having presented a challenge to the Government's "policy decision to support Pinochet's rise to power," whereas the present case challenges specific "acts of torture . . . committed after the military government was already in place." Because these acts "could not have been committed in furtherance of any policy decision to support Pinochet's rise to power," they reason, their claims raise no political question. The plaintiffs also cite *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), for the proposition that "claims based on a narrow class of international norms, such as . . . claims of torture and extrajudicial killing, should be protected [sic] and adjudicated in U.S. courts."

The Supreme Court has recognized a half dozen reasons for which a case may be nonjusticiable under the political question doctrine:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). As mentioned above, the United States here argues the first and second reasons; if either obtains, the courts are without jurisdiction to proceed. *See Schneider*, 412 F.3d at 194.

Despite the plaintiffs' efforts, we fail to see how this case can be distinguished from *Schneider*. In each instance the plaintiffs brought claims under the common law, international law, the ATS, and the TVPA. The plaintiffs in *Schneider* alleged the United States and Kissinger, in conjunction with certain Chilean officials, facilitated kidnapping and torture in order to further the goals of "[k]ey United States policymakers" who had opposed the election of President Allende. *Id.* at 191-92. We held the plaintiffs' claims nonjusticiable per the political question doctrine because they challenged "foreign policy decisions of the United States. . . . within the province of the political branches." *Id.* at 195. More specifically, the complaint presented questions "textually committed to a coordinate branch of government," running afoul of the first reason stated in *Baker v. Carr*. *Id.* at 194.

The same is true here. The plaintiffs have alleged and challenged drastic measures taken by the United States and Kissinger in order to implement United States policy with respect to Chile. For the court to evaluate the legal validity of those measures would require us to delve into questions of policy "textually committed to a coordinate branch of government." *Id.* It is of no moment that the acts alleged in this case took place after the coup. True, as the plaintiffs state, those acts "could not have been committed in furtherance of any policy decision to support Pinochet's rise to power," but the difference between actions taken to place Pinochet in power and actions taken to keep him in power does not a viable distinction make: Both types of

actions, if they occurred, were "inextricably intertwined with the underlying" foreign policy decisions constitutionally committed to the political branches. *Bancoult*, 445 F.3d at 436. Nor are we persuaded by the plaintiffs' purported distinction between challenging an "action" and challenging a "policy." As we explained in *Bancoult*, the dichotomy is false; actions taken in furtherance of foreign relations themselves may "constitute[] foreign policy decisions." *Id.* at 437.

Such is indeed the case here. Although the plaintiffs attempt to characterize Kissinger's acts as *ultra vires*, Compl. ¶ 2, we reiterate what we said in *Schneider*: Whatever Kissinger did as National Security Advisor or Secretary of State "can hardly be called anything other than foreign policy." 412 F.3d at 199.

To be sure, we can imagine a case in which a rogue agent commits an act so removed from his official duties that it cannot fairly be said to represent the policy of the United States, but this is not such a case. The plaintiffs allege Kissinger "purposefully act[ed] outside the proper channels of Congressional oversight," Compl. ¶ 43, but that does not take his conduct outside the scope of his employment; the statutory descriptions of Kissinger's positions make clear his duty was to the President, not to the Congress. *See* 22 U.S.C. § 2656 (Secretary of State responsible for "conduct[ing] the business of the department in such manner as the President shall direct"); 50 U.S.C. § 402(a)-(b) (function of National Security Council, of which National Security Advisor is a member, "to advise the President with respect to the integration of . . . policies relating to the national security" and to perform "such other functions as the President may direct").

We need not quarrel with the plaintiffs' assertion that certain claims for torture may be adjudicated in the federal courts as provided in the TVPA, *see* 28 U.S.C. § 1350 note. We simply observe that such a claim, like any other, may not be heard if it presents a political question. So it was that, before concluding the present case is entirely nonjusticiable under the political question doctrine, we requested supplemental briefing on the justiciability of the plaintiffs' claims under the TVPA. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (although "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature .... it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts" (internal quotation marks omitted)). As we have seen, however, the plaintiffs were unable to extricate their TVPA claims from the political question that permeates their complaint. The plaintiffs having failed to present any cognizable factual distinction of, or persuasive legal argument for departing from, our decision in *Schneider*, that precedent must control this case.

III. Conclusion

In *Schneider* we held nonjusticiable various claims against the United States and Dr. Kissinger for measures allegedly taken in the 1970s to implement the United States' foreign policy with respect to Chile. We do so again today. Because the plaintiffs' claims call into question foreign policy decisions textually committed to the political branches, they must be and hereby are

Dismissed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5017 **September Term, 2005**

LAURA GONZALEZ-VERA, ET AL.,

APPELLANTS

V.

HENRY ALFRED KISSINGER, IN HIS INDIVIDUAL CAPACITY AND AS NATIONAL SECURITY ADVISOR AND SECRETARY OF STATE, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 02cv02240)

Before: GINSBURG, *Chief Judge*, and ROGERS and BROWN, *Circuit Judges.*

JUDGMENT

(Filed Jun. 9, 2006)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed on the ground that plaintiffs' claims present a

nonjusticiable political question, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ [Illegible]
Michael C. McGrail
Deputy Clerk

Date: June 9, 2006

Opinion for the court filed by Chief Judge Ginsberg.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA GONZALEZ-VERA, et al., **Plaintiffs,** **v.** **HENRY ALFRED KISSINGER, et al.,** **Defendants.**	**Civil Action 02-02240 (HHK)**

MEMORANDUM OPINION

By this action, plaintiffs seek to hold defendants, the United States of America and Henry Alfred Kissinger, liable for injuries they and their relatives sustained at the hands of persons in Chile whose efforts led to and, thereafter, sustained the regime of General Augusto Pinochet. Claiming that defendants assisted and condoned the actions of those who subjected them and those whom they represent to inhuman and degrading treatment, plaintiffs assert causes of action based on international law, District of Columbia tort law, the laws of Chile, the Torture Victims Protection Act, Pub. L. No. 102-256, 196 Stat. 73 (1992) (codified as a note to 28 U.S.C. § 1350), and the Alien Tort Claims Act, 28 U.S.C. § 1350.

Presently before this court is defendants' motion to dismiss [#5]. Defendants move to dismiss this action on the grounds that plaintiffs' claims are nonjusticiable under the political question doctrine and are barred against the United States by sovereign immunity and against Kissinger by absolute and/or qualified immunity. Defendants

also assert that plaintiffs fail to state a claim for which relief can be granted. Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that defendants' motion must be granted.

I. BACKGROUND INFORMATION

The following recitation assumes the truth of the factual assertions in plaintiffs' complaint.[1] Plaintiffs' claims arise out of United States involvement in Chilean affairs in the 1970s. During much of this time, Kissinger was a high ranking government official, serving as Assistant to the President for National Security Affairs[2] from January 20, 1969 to November 3, 1975, and as Secretary of State from September 22, 1973 until January 20, 1977.

In 1970, Salvador Allende, a Marxist, became President of Chile after a democratic election. In order to prevent him from governing Chile, defendants supported and encouraged members of the Chilean military who were willing to organize a coup against Allende even though they were fully aware of the human rights violations that would follow. Defendants provided money and guns to coup plotters that were used to eliminate any person standing in the way of a successful coup.

An unsuccessful coup attempt occurred in October 1970. A successful coup on September 11, 1973, however, led to the repressive regime of General Augusto Pinochet. After the coup, from 1973 until 1978, the Chilean Directorate of

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[1] Defendants state that plaintiffs' complaint, "in a number of respects, is contradicted by the historical record." Defs.' Mot. to Dismiss at 2.

[2] This position is now titled National Security Advisor.

National Intelligence ("DINA"), headed by General Manuel Contreras Sepulveda, coordinated a scheme of brutal repression, including a system of arrests, torture, execution, and disappearances, to control the activities of and eliminate individuals associated with the political left who opposed Pinochet's regime. Plaintiffs and their relatives were among the victims of that repression. Based on reports from the Assistant Secretary of State for Inter-American Affairs and the Central Intelligence Agency ("CIA"), Kissinger was well aware of the gross human rights violations DINA committed. In the early 1970s, the United States assisted DINA by teaching DINA agents counterinsurgency and torture tactics at a U.S. Department of Defense facility.

Kissinger expressed disagreement with any attempt to limit Pinochet's economic and military power and misled the international community into thinking that he opposed General Pinochet's repression. For example, in 1976, at a meeting of the General Assembly of the Organization of American States, Kissinger gave a speech in which he advised Pinochet to achieve progress on human rights to improve Chile's image in the U.S. Congress. Behind closed doors, however, Kissinger indicated to Pinochet that the U.S. Government was sympathetic to Pinochet's goal of eliminating any ideological opposition.

II. ANALYSIS

A. Nonjusticiability

"The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of

the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Cases that are nonjusticiable because of the political question doctrine are those in which there is

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). If any one of these six factors applies, the case is nonjusticiable. *Id.*

Defendants argue that this action is nonjusticiable because it implicates U.S. foreign and national security policy. Characterizing this case as one in which the court would have to determine whether the United States should have assisted those plotting to overthrow the Allende government and supported the repressive regime which replaced it, defendants contend that such matters are committed to the discretion of the political branches of government and would be impossible to adjudicate without an initial policy determination of a kind clearly for nonjudicial discretion, an undertaking prohibited under the first and third *Baker* factors. Defendants also argue that the second *Baker* factor applies as there are no judicially discoverable and manageable standards for resolving

plaintiffs' claims.[3] Plaintiffs, defendants argue, do not allege a violation of the Constitution, a federal statute, or self-executing treaty. Furthermore, District of Columbia tort law fails to supply requisite standards because the "reasonableness" standard upon which tort law is founded cannot be assessed in the foreign and national security context.

Plaintiffs respond that this case is justiciable because they do not challenge defendants' foreign policy but, instead, their violations of individual human rights. Drawing a distinction between foreign policy decisions and the *implementation* of such policy, plaintiffs argue that challenges to the implementation of policy, unlike challenges to the policy decisions themselves, are justiciable.[4]

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[3] One of the case cases upon which defendants rely is *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), in which this court found that a challenge to atrocities allegedly committed against the plaintiffs by U.S.-sponsored terrorist forces in Nicaragua presented a nonjusticiable political question. *Sanchez-Espinoza* provides scant support for defendants' position. First, while the facts in that case are similar to those here and the court's judgment was affirmed on appeal, the D.C. Circuit on review refused to address the political question issue even though it was the basis of this court's decision. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985). Second, the case was decided before the D.C. Circuit's decision in *Committee of U.S. Citizens*, which found challenges to the decision of the United States to provide aid to the Nicaraguan "Contras" were not barred by the political question doctrine. *See Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934-35 (D.C. Cir. 1988). Third, in *Sanchez-Espinoza*, the court found that a judicial decision on the merits would risk multifarious pronouncements by different branches of the government regarding ongoing foreign policy decisions. *See Sanchez-Espinoza*, 568 F. Supp. at 600. Because this case concerns conduct occurring more than thirty years ago, that risk is not present here.

[4] For support, plaintiffs rely primarily on *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987); *Population Inst. v. McPherson*, 797 F.2d 1062, 1068-70 (D.C. Cir. 1986); *Ramirez de*

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Plaintiffs forcefully argue that a decision not to review defendants' actions would be contrary to the very purpose of the judiciary – to protect individual human rights – as established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Court in *Marbury* stated, "it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress," *id.* at 163 (quoting Blackstone, vol. 3, p. 109), and that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Id.* at 170. Because it is the core function of the judiciary to protect fundamental rights, plaintiffs assert that the separation of powers interests that underlie the political question doctrine should not deter this court from adjudicating this controversy.[5]

The issue of whether this case is non-justiciable under the political question doctrine is a close one. On the one hand defendants are correct when they assert that this action implicates this nation's foreign affairs and thus involves matters that are committed to the political

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Arellano v. Weinberger, 745 F.2d 1500, 1511-15 (D.C. Cir. 1984), *vacated and remanded for reconsideration*, 471 U.S. 1113 (1985).

[5] In support of their position, plaintiffs cite *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). In *Letelier*, this court, Green, J., held that the discretionary function provisions of the Federal Tort Claims Act and the Foreign Sovereign Immunities Act did not afford a foreign country the right to perpetrate actions that are "clearly contrary to the precepts of humanity as recognized in both national and international law." *Id.* at 673. Plaintiffs argue that just like the discretionary function exception, a precept based on separation of powers doctrine, the political question doctrine, which also embodies separation of powers concerns, likewise does not afford executive branch officials discretion to violate human rights.

branches of government. On the other hand, as plaintiffs point out, and as the Supreme Court has explicitly stated, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Just where the non-justiciability line is drawn, however, is very difficult to discern. The District of Columbia Circuit has expressly recognized the problem. In *Committee of U S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988), the D.C. Circuit stated "[n]o branch of the law of justiciability is in such disarray as the doctrine of the political question," and that "there is no workable definition of characteristics that distinguish political questions from justiciable questions, and . . . the category of political questions is more amenable to description by infinite itemization than by generalization." *Id.* at 933 (internal quotation marks and citation omitted). For this reason the District of Columba Circuit finds the "blanket invocation of the political question doctrine to be inappropriate." *Id.*

Because of its apprehensions about the current state of the political question doctrine, the D.C. Circuit has sought, when possible, to decide cases on other grounds. For example, in affirming the district court's dismissal of an action brought against President Reagan alleging violations of individual rights resulting from the United States support of the "Contras" in Nicaragua, the D.C. Circuit stated,

> Without necessarily disapproving the District Court's conclusion that all aspects of the present case present a nonjusticiable political question, we choose not to resort to that doctrine for most of the claims. Since we find other bases for dismissing the suit – and bases which do not expand

> our jurisdiction by resolving the assertedly political question on its merits we prefer to rest our affirmance of the District Court's judgment in most respects on different grounds.

Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985), *see also Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) ("We affirm the district court's order on the [discretionary function exception] ground and express no opinion on that court's alternative, 'political question' rationale."); *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Edwards, J., concurring) ("It is therefore clear that the political question doctrine is a very limited basis for nonjusticiability.").

In light of the D.C. Circuit's hesitance to apply the ill-defined and nebulous political question doctrine and the defendants' failure to provide a principled basis to distinguish this case from cases where the judiciary has resolved legal questions that touch on the manner in which the United States pursues its foreign policy objectives,[6] this

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[6] *See, e.g., Antolok v. United States*, 873 F.2d 369, 391 (D.C. Cir. 1989) (Wald, J., concurring) (discussing cases in which the Supreme Court adjudicated cases on the merits in spite of significant foreign policy ramifications). Many of the cases in which courts have found a political question to exist are easily distinguished from this case. Some of the cases have involved challenges to the President's use of military force or weapons in overt operations. *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (finding that the political question doctrine barred review of the United States' bombing of Cambodia); *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991) (refusing to decide a challenge to the government's deployment of armed forces in Panama), *aff'd on other grounds*, 957 F.2d 886 (D.C. Cir. 1992); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (finding that a case involving the military's mistaken decision to shoot down an Iranian airliner presented a political question); *cf. Chaser*

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court declines to apply the doctrine in this case. Rather, the court shall address the other grounds for dismissal asserted by defendants.[7]

C. Sovereign Immunity

Sovereign immunity shields the federal government from suit unless it is waived. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. Sherwood*, 312 U.S. 584, 586 (1941). Because sovereign immunity is jurisdictional in nature, *Meyer*, 510 U.S. at 475, "the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Sherwood*, 312 U.S. at 586. As the Supreme Court has often observed, waiver of sovereign immunity must be "unequivocally expressed in the statutory text," *Lane v. Pena*, 518 U.S.

Shipping Corp. v. United States, 649 F. Supp. 736 (S.D.N.Y. 1986) (refusing to adjudicate dispute asserting that the CIA negligently placed land mines in Nicaraguan harbor). The instant case can be distinguished, because the Chilean coup of September 11, 1973, did not involve the overt use of U.S. military forces. This case is also distinguishable from cases that involve the recognition of foreign governments. *See Baker*, 369 U.S. at 212; *United States v. Pink*, 315 U.S. 203, 229 (1942); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938); *Antolok v. United States*, 873 F.2d 369, 381-82 (D.C. Cir. 1989). The decision to recognize a foreign state is a purely discretionary decision such that the court would have no basis for evaluating its validity. The types of fundamental rights at issue here, however, are not rights that individuals enjoy only at the pleasure of the executive branch.

[7] In a related case, *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), Judge Collyer held that a similar action was nonjusticiable under the political question doctrine. *Id.* at 259-64. Nonetheless, because of the D.C. Circuit's reluctance to rely on the political question doctrine, Judge Collyer also addressed the defendant's immunity arguments as alternative bases for dismissal. *Id.* at 263 n.13.

187, 192 (1996), and "strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citations omitted).[8]

Plaintiffs argue that sovereign immunity does not bar their suit against the United States because this action is premised on violations of peremptory, or *jus cogens*, norms of international law, "a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted . . . .'" *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (quoting *Committee of U.S. Citizens*, 859 F.2d at 940). Plaintiffs also contend that principles of comity require that the United States not be afforded immunity for conduct for which it denies immunity when committed by foreign nations. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*

The problem for plaintiffs is that their position, in effect, has been addressed and rejected by the D.C. Circuit in *Princz*, 26 F.3d at 1174, and again in *Joo v. Japan*, 332 F.3d 679, 686-87 (D.C. Cir. 2003). In *Princz*, an American survivor of the Holocaust sued the Federal Republic of Germany for injuries he suffered as a slave laborer in Nazi concentration camps during World War II. While acknowledging that "it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich," the D.C. Circuit concluded that violations of *jus*

[8] A party bringing suit against the United States bears the burden of proving that the government has unequivocally waived its immunity. *See, e.g., Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1005 (9th Cir. 1998); *James v. United States*, 970 F.2d 750, 753 (10th Cir. 1992); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

cogens nouns did not constitute an implied waiver of immunity under the FSIA because the foreign state never expressed an intent to allow itself to be sued for *jus cogens* transgressions. *Princz*, 26 F.3d at 1174 ("We have no warrant, therefore, for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA."). While *Princz* concerned foreign sovereign immunity, its reasoning is equally applicable here. Indeed, the case for waiver here is less persuasive than in *Princz*, because unlike foreign sovereign immunity, there can be no implied waiver of federal sovereign immunity. *See Lane*, 518 U.S. at 192. Accordingly, sovereign immunity bars plaintiffs' claims against the United States and the United States must be dismissed from this action. The court now turns to consider whether Kissinger is immune from suit.

D. Westfall Act

The Federal Employees Liability Reform and Tort Compensation Act, also known as the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. § 2671 *et seq.*), provides that federal officials are immune from suit for money damages for their neglectful or wrongful conduct as long as they act within the scope of their employment. *See* 28 U.S.C. § 2679(b)(1); *United States v. Smith*, 499 U.S. 160, 163 (1991); *Haddon v. United States*, 68 F.3d 1420, 1422-23 (D.C. Cir. 1995). The Westfall Act authorizes the Attorney General or her designee to certify that a federal employee was acting within the scope of the employee's employment when an incident giving rise to a lawsuit occurred. *See* 28 U.S.C. § 2679(d)(2); 28 C.F.R. § 15.3, Upon certification, unless challenged, the United States is substituted as the defendant. 28 U.S.C.

§ 2679(d)(2); *Haddon*, 68 F.3d at 1423. If the certification is challenged, however, the court is empowered to conduct an independent review. *See Id.* If after such review, the United States is substituted as the defendant, a plaintiff's only avenue for relief is through the Federal Tort Claims Act. *See* 28 U.S.C. § 2679(b)(1); *Smith*, 499 U.S. at 161-62.

Defendants argue that because the Attorney General's designee has certified that Kissinger was acting within the scope of his employment at the time of the incidents that underlie this action, he is entitled to immunity and this action should be dismissed. Plaintiff's challenge the certification, maintaining that violations of *jus cogens* norms, including crimes against humanity and torture, cannot be the kinds of acts Executive Branch officials are employed to perform.[9] Appreciating that an important

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[9] Whether an employee acted within the scope of employment for purposes of establishing immunity is a question of law, in this case District of Columbia law. *See Haddon*, 68 F.3d at 1423; H.R. REP. NO. 100-700, at 5, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949 (expressing congressional intent that, under the Westfall Act, scope of employment be determined according to the law of the state in which the alleged illegal act occurred). The District of Columbia looks to the RESTATEMENT OF AGENCY for its scope of employment standard. *See Haddon*, 68 F.3d at 1423-24. According to the RESTATEMENT OF AGENCY, conduct of an employee is within the scope of employment if:

> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958). The critical question in determining whether conduct is of the kind the person is employed to

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foreign policy objective of the United States during the time covered by this suit was to prevent the spread of Communism, plaintiffs contend that neither the Congress nor the President, collectively Kissinger's "master," expected or encouraged him "to promote U.S. interests abroad through support and encouragement of known human rights violators." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 28. In providing such support and encouragement, plaintiffs argue that Kissinger was acting *ultra vires*. In support of their position that Kissinger's conduct was *ultra vires*, plaintiffs point to statements from executive branch officials regarding U.S. actions in Chile[10] and the "necessity" of two investigations by Congress of the

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perform is whether the action was foreseeable given the duties of the employee. *See Johnson v. Weinberg*, 434 A.2d 404, 408 (D.C. 1981) (citing RESTATEMENT (SECOND) OF AGENCY § 245); *see also Penn Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 30 (D.C. 1979) ("The issue, then, becomes whether the conduct in question is 'so unforeseeable' as to make it unfair to charge the (employer) with responsibility." (internal quotation marks omitted)). Conduct is foreseeable if it is "a direct outgrowth of the employee's instructions or job assignment." *See Haddon*, 68 F.3d at 1424 (internal quotation marks and citation omitted).

[10] In February 2003 Secretary of State Colin Powell commented that he was "not proud" of the role the United States played in the 1973 coup that brought down Allende. *Interview on Black Entertainment Television's Youth Town Hall*, (Feb. 20, 2003) *available at* http://www.state.gov/secretary/rm/2003/17841.htm. Plaintiffs also quote the "Executive Branch" as saying that there is a need to judge "the extent to which U.S. actions undercut the cause of democracy and human rights in Chile," Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 28-29, but there is no such statement in the citation provided. U.S. Dep't of State Office of the Spokesman Press Statement on the Chile Declassification Project, June 30, 1999, *available at* http://secretary.state.gov/www/briefings/statements/1999/ps990630.html.

events that are the subject of this suit, one conducted in the 1970s and the other in the 1990s.[11]

Assuming the truth of plaintiffs' factual allegations concerning Kissinger's conduct – as opposed to their characterization of such conduct – the court concludes that Kissinger acted within the scope of his duties as Senior Advisor to the President for National Security Affairs and as Secretary of State at all times pertinent to this action. Neither the statements by State Department officials concerning the involvement of the United States in the 1973 coup, made long after the events to which they refer, nor the two congressional investigations plaintiffs reference support the proposition that Kissinger acted outside the scope of his offices. Indeed, Congress's Church Report shows that U.S. support for the Chilean coup plotters originated in a direct order of the President of the United States. Staff Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. (1975), *available at* http://foia.state.gov/Reports/ChurchReport.asp. The declassified memorandum of conversation between Pinochet and Kissinger that plaintiffs claim shows Kissinger's sympathy with Pinochet's goal of eliminating ideological opposition, when read in context, also does not support their contention

[11] Plaintiffs also point to a cable they say was sent by the CIA to its officers in Santiago that purportedly instructed them "to continue their work of promoting a successful coup in spite of 'other policy guidance' that they may receive from other branches of the U.S. government." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 29. The court was unable to locate this document. In any event, this CIA cable is not directly attributable to Kissinger and provides no indication regarding whether he was acting in the scope of his employment.

that Kissinger acted beyond the scope of his employment.[12] To the contrary, Kissinger expressed that human rights abuses in Chile complicated Chile's relationship with the United States and that the United States wanted to know how Chile intended to improve in the area of human rights. Thus, it appears that Kissinger's actions were taken in accordance with the U.S. policy towards Chile at the time.

Plaintiffs assertions that Kissinger's conduct was wrongful, even very wrongful, is of no legal moment. As defendants point out, the immunity provided by the Westfall Act explicitly extends to "wrongful act[s]," 28 U.S.C. § 2679(b)(1). If the immunity only extended to lawful acts it "would only be available where it is not

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[12] In the declassified memorandum of conversation of June 8, 1976, Kissinger told Pinochet, "The speech [on human rights] is not aimed at Chile. I wanted to tell you about this. My evaluation is that you are a victim of all left-wing groups around the world, and that your greatest sin was that you overthrew a government which was going Communist." Mem. of Conversation at 3, *available at* http://www.pbs.org/newshour/bb/latin_america/chile/documents/6876pinochet.pdf. Kissinger also said, "We welcomed the overthrow of the Communist-inclined government here. We are not out to weaken your position." *Id.* at 8. Plaintiffs rely on these portions of the conversation. However, Kissinger also told Pinochet:

> At the same time, we face massive domestic problems, in all branches of the government, especially Congress, but also in the Executive, over the issue of human rights. But basically we don't want to intervene in your domestic affairs. We can't be precise in our proposals about what you should do. But this is a problem which complicates our relationships and the efforts of those who are friends with Chile. . . . [T]he human rights issue has impaired relations between the U.S. and Chile. . . . I hope you will shortly remove those obstacles. . . . It would really help if you would let us know the measures you are taking in the human rights field.

needed; in effect, the immunity doctrine would be completely abrogated." *Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (internal quotation marks and citation omitted).[13]

I. Alien Tort Claims Act

Even if a federal employee is determined to have acted within the scope of his employment he is not immune to suit if one of two exceptions to the Westfall Act applies. Congress preserved a federal employee's individual liability for "a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2)(A),[14] or "a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Defendants argue that other than possibly for their claim under the Torture Victim's Protection Act, plaintiffs fail to asset a claim that falls within the exceptions. Plaintiffs do not allege a violation of the Constitution and, defendants maintain, with the possible exception of their Torture Victim's Protection Act claim, plaintiffs' claims are either grounded on alleged violations of various treaties or sources of international law. Defendants contend that plaintiffs' invocation of the Alien Tort Claims

[13] Because the court concludes that sovereign immunity applies and that Kissinger was acting within the scope of his employment, plaintiffs' tort claims under District of Columbia law must be dismissed. No exception to substitution under the Westfall Act applies for alleged violations of local law. Also, the court rejects plaintiffs argument that the Westfall Act does not confer immunity over international law claims under 28 U.S.C. § 1331.

[14] The Westfall Act exception for constitutional claims is not applicable in the instant case because plaintiffs have not alleged a violation of the Constitution.

Act, 28 U.S.C. § 1350 ("ATCA"), is unavailing because it is merely jurisdictional and creates no substantive rights or duties that can be violated. Defendants are correct.

The Alien Tort Claims Act, in pertinent part provides, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws or nations or a treaty of the United States." 28 U.S.C. § 1350. Recently, in *Sosa v. Alvarez-Machain*, 540 U.S., 124 S. Ct. 2739 (2004), the Supreme Court held that the ATCA is a "*jurisdictional grant* . . . best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time" the ATCA was enacted in 1789. *Id.* at 2761 (emphasis supplied). The Court stated that the First Congress, in enacting the ATCA, "understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations," but determined that the torts that the First Congress had in mind did not extend beyond three primary offenses, namely violation of safe conducts, infringement of the rights of ambassadors, and piracy.[15] *Id.* While nothing has "categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law," they "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features

[15] These three primary offenses were referred to by Blackstone as offenses against the law of nations that the criminal law of England addressed. *Sosa*, 124 S. Ct. at 2756 (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1789)).

of the 18th-century paradigms we have recognized." *Id.* at 2761-62.

In any event and assuming arguendo that the ATCA "provides jurisdiction and a cause of action," as plaintiffs assert, plaintiffs ATCA claim still is not one "brought for a violation of" a federal statute. *See* § 2679(b)(2)(B). As defendants observe, "the plaintiffs' argument fails because it conflates the two distinct questions of whether a statute confers substantive rights, on the one hand, and whether a statue confers *a cause of action* to remedy a violation of substantive rights, on the other." Defs.' Reply in Supp. of Mot. to Dismiss at 19-20 (emphasis original). In sum, the ATCA grants no rights to aliens, but simply provides the federal courts with jurisdiction to adjudicate rights conferred elsewhere. Accordingly, because United States officials cannot "violate" § 1350, the liability-preserving exception of § 2679(b)(2) does not apply to plaintiffs' claims.

ii. Torture Victims Protection Act

The Torture Victims Protection Act ("TVPA") was enacted in 1992 to amend the ATCA to provide civil liability for torture or extrajudicial killing carried out by an individual "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). Defendants admit that the definitions of "torture" and "extrajudicial killing" in the TVPA are substantive norms that could give rise to a cause of action. Assuming arguendo that the TVPA falls within the exception to absolute immunity in the Westfall Act, defendants, nonetheless, move to

dismiss plaintiffs' TVPA claims for failure to state a claim under Fed.R.Civ.P. 12(b)(6).

Defendants argue that plaintiffs fail to state a claim under the TVPA because it imposes liability only upon individuals acting "under actual or apparent authority, or color of law, *of any foreign nation.*" *Id.* (emphasis added). Defendants contend that the TVPA does not provide a basis for asserting a cause of action against Kissinger because he acted under actual or apparent authority, or color of law, of the United States, not a foreign nation.[16] Plaintiffs respond that defendants' "limited" interpretation of the TVPA is "not only tenuous, unnatural, and excessively narrow, but also contradicts congressional intent. . . . " Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 33. Also, invoking principles of agency law and principles that hold aiders and abettors liable for misdeeds directly committed by others, plaintiffs assert that Kissinger may be held liable under theories of secondary liability. Plaintiffs' position is without merit.

The plain language of the TVPA limits liability to those acting under color of law of a foreign nation. *See White v. Paulsen*, 997 F. Supp. 1380, 1385 n.1 (E.D. Wa. 1998) ("On its face, the right of action created by the Torture Victim Protection Act is limited to conduct taken under color of law of a 'foreign' nation."). The legislative history refers to torture or extrajudicial killing committed by foreign actors rather than domestic ones. *See, e.g.*, H.R. REP. NO. 102-3670), at 3-4, *reprinted in* 1992 U.S.C.C.A.N.

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[16] Defendants make a very credible argument that Kissinger enjoys qualified immunity from claims grounded on the TVPA, which, in any event, does not have retroactive effect. See discussion in Defendant's Motion to Dismiss pp. 28-34.

84, 86 ("[T]he TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."); *id.* at 4, *reprinted in* 1992 U.S.C.C.A.N. 84, 87 ("[O]nly 'individuals,' not *foreign* states, can be sued under the bill.") (emphasis added); *id.* at 5, *reprinted in* 1992 U.S.C.C.A.N. 84, 88 ("The TVPA is subject to the restrictions in the Foreign Sovereign Immunities Act of 1976 [FSIA].").

To find that Kissinger acted under color of foreign law would require the court to conclude that Kissinger acted as an agent of the Chilean government while serving as National Security Advisor or Secretary of State – a far fetched proposition at best and, more importantly and significantly, one that was not alleged in plaintiffs' complaint. "One becomes an agent only if another in some way indicates to him consent that he may act on the other's account" and the agent consents to the agency relationship. RESTATEMENT (SECOND) OF AGENCY § 15 (1958). None of the allegations in the complaint supports the existence of an agency relationship between Kissinger and Chile. Thus, "agency" does not provide a basis a [sic] for imposing secondary liability on Kissinger.

Plaintiffs argument that Kissinger acted under color of Chilean law because he aided and abetted the Chilean authorities who perpetrated the acts alleged in their complaint is equally unavailing. Aiding and abetting is a separate cause of action that extends liability "beyond persons who engage, even indirectly, in a proscribed activity." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994). This theory of liability cannot be stretched to encompass Kissinger's alleged conduct because he was neither a higher official who authorized and directed acts of torture or extrajudicial killing nor an individual who acted in concert with a

foreign state to commit such acts.[17] The legislative history of the TVPA indicates that Congress was concerned with holding liable higher officials of a foreign state who authorized or directed torture, but did not personally carry out such acts. *See* S. REP. No. 102-249, 102d Cong., 1st Sess., 1991 WL 258662 (Nov. 26, 1991). The Senate Report states that:

> a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

Id. at 9. Courts have permitted the imposition of aider and abettor liability in cases involving higher officials of a

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[17] The legislative history of the TVPA indicates, and courts have held, that the TVPA provides a cause of action for aider and abettor liability. *See* S. REP. NO. 102-249, at 8-9 & n.16, 102d Cong., 1st Sess., 1991 WL 258662 (Nov. 26, 1991); *see, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 776-79 (9th Cir. 1996); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d. 1325, 1332-33 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *15-16 (S.D.N.Y. Feb. 28, 2002). The Senate Report on the TVPA states that the statute is intended to apply to those who "ordered, abetted, or assisted" in the torture. S. REP. No. 102-249, at 8-9 & n.16. Congress modeled the TVPA on various international agreements condemning torture, many of which provide for aider and abettor liability based on the recognized need to bring to justice the leaders who condone and allow torture as well as the functionaries who carry it out. *See id.* at 9 n.16; *see also Cabello Barrueto*, 205 F. Supp. 2d at 1332-33 (noting that international law and international treaties all confer liability upon those who order, instigate or abet torture). Courts have held that the TVPA provides a cause of action for aider and abettor liability.

foreign state who authorized or directed torture. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 776-79 (9th Cir. 1996) (affirming jury instruction that permitted the estate of former Filipino president to be held liable for torture committed by military under former president's command); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1332-33 (S.D. Fla. 2002) (denying the motion to dismiss of a former Chilean military officer who allegedly aided and abetted acts of torture committed by other Chilean officials although the defendant did not actually torture individuals himself); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002) (holding a former Bosnian Serb soldier liable for aiding and abetting torture). Kissinger, however, was not an official who had higher authority over those in DINA who actually carried out the acts of torture.

Nor do the allegations of the complaint, even if true, state a claim for aiding and abetting on the grounds that Kissinger was a "'willful participant' in joint action with the state or its agents in the deprivation of plaintiffs' rights." *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *15 (S.D.N.Y. Feb. 28, 2002) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)). The court in *Wiwa* denied the motion to dismiss of a former managing director of a corporation that allegedly directed and aided the Nigerian government in committing acts of torture and extrajudicial killing by providing financial assistance to the military police who perpetrated abuses of human rights, offered bribes for false testimony, and participated in the campaign to arrest the plaintiffs. *Id.* at *15-16. In contrast, the allegations in the instant complaint are not that Kissinger was a "willful participant" in the deprivation of plaintiffs

rights and the right of those whom they represent. Plaintiffs' complaint allege the following facts:[18]

- Kissinger "supported, assisted, and recklessly encouraged members of the Chilean military who were willing to organize a coup against Dr. Allende." Compl. ¶ 36.
- Kissinger was "fully aware of the foreseeable consequences of [the] coup," *id.* ¶ 38, and had information from the CIA assessing that a coup would result in about 10,000 deaths. *Id.* ¶ 45.
- Kissinger was "well aware of the gross human rights violations committed by the DINA in Chile," *id.* ¶ 63, yet "continued to support the regime and [was] reluctant to speak out against these atrocities." *Id.* ¶ 68.
- Kissinger expressed disagreement with attempts to limit Pinochet's economic and military power. *Id.* ¶ 73.
- While Kissinger advocated human rights in public speeches, he privately told Pinochet that the U.S. Government was sympathetic to Pinochet's goal of eliminating any ideological opposition. *Id.* ¶ 74.

The assertions that Kissinger supported the coup against Allende, was aware of the human rights abuses that likely would follow, and generally approved of Pinochet's regime, is not the same as or the functional equivalent of

[18] Of course, the court is bound to accept and give effect to plaintiffs' factual assertions. It is not required to accept their characterization of the facts or accept the inferences they draw from the facts, however.

asserting that Kissinger ordered, authorized, supported, or encouraged the human rights violations perpetrated by Pinochet supporters. Further, the assertion that Kissinger was sympathetic to Pinochet's goal of eliminating ideological opposition is inadequate to state a claim for aiding and abetting under the TVPA. An expression of sympathy towards Pinochet's goal of eliminating ideological opposition does not indicate that Kissinger agreed with Pinochet's *means* of accomplishing his goal.

III. CONCLUSION

For the foregoing reasons, this court concludes that defendants' motion to dismiss must be granted. An appropriate order accompanies this memorandum opinion.

Henry H. Kennedy, Jr.
United States District Judge

Dated: September 17, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA GONZALEZ-VERA, et al., **Plaintiffs,** **v.** **HENRY ALFRED KISSINGER, et al.,** **Defendants.**	**Civil Action 02-02240 (HHK)**

ORDER AND JUDGMENT

Pursuant to FED. R. CIV. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 17th day of September, 2004, hereby

ORDERED and ADJUDGED that the complaint in this case is **DISMISSED** as to the United States and Henry Alfred Kissinger.

Henry H. Kennedy, Jr.
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5017 **September Term, 2005**

02cv02240

Filed On: August 17, 2006
[986647]

Laura Gonzalez-Vera, et al.,
Appellants

v.

Henry Alfred Kissinger, in his individual capacity and as National Security Advisor and Secretary of State, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Rogers and Brown, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 21, 2006, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5017 September Term, 2005

02cv02240

Filed On: [Aug. 17, 2006]

Laura Gonzalez-Vera, et al.,

Appellants

v.

Henry Alfred Kissinger, in his individual capacity and as National Security Advisor and Secretary of State, et al.,

Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland*, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Garland did not participate in this matter

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ [Illegible]
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA GONZALEZ-VERA, et al.,

Appellees,

v.

HENRY ALFRED KISSINGER, et al.,

Appellants.

No. 05-5017

Monday, March 27, 2006

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE GINSBURG AND CIRCUIT JUDGES ROGERS AND BROWN

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

AARON LLOYD, (Student Counsel)

ON BEHALF OF THE APPELLEE:

ROBERT M. LOEB, ESQ.

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[3] PROCEEDINGS

THE CLERK: Case number 05-5017, Laura Gonzalez-Vera, et al., Appellants v. Henry Alfred Kissinger, in his individual capacity and as National Security Advisor and Secretary of State, et al. Mr. Lloyd for the Appellants; Mr. Loeb for the Appellees.

MR. TIGAR: Chief Judge Ginsburg, may it please the Court, my name is Michael Tigar. I'm a professor of American University of Washington College of Law. I want to introduce our student lawyer, Aaron Lloyd. We've filed the necessary papers and I ask the Court's leave that he present the oral argument this morning.

JUDGE GINSBURG: Be happy to hear from him.

MR. TIGAR: Thank you very much.

ORAL ARGUMENT OF AARON LLOYD ON BEHALF OF THE APPELLANTS

MR. LLOYD: Good morning, Your Honors. May it please the Court, my name is Aaron Lloyd and I represent Laura Gonzalez-Vera and the other plaintiffs in this case.

Your Honors, my argument will demonstrate two points. First, *Schneider*, *Youngstown*, and the *Committee of U.S. Citizens* cases show that these claims are justiciable. Two, no immunities bar this Court from hearing this case and providing a remedy for the harms of torture and extrajudicial killing.

[4] Your Honors, *Schneider* does not bar the hearing of this case. In *Schneider*, the Court found that it was U.S. national policy that a General be removed from power to prevent an unfriendly government from coming into office. At no point has the U.S. said that it was national policy to aid and abet torture. In contrast, aiding and abetting torture is clearly contrary to U.S. policy. The Hughes-Ryan Amendment in 1974 clearly said that from that point onward Congress said that the CIA shall not engage in any activities other than strict intelligence gathering. The TVPA indicates Congressional policy that torture shall be both illegal and those who torture shall be liable. House Joint Resolution 605 in 1984 stated that it is the continuing policy of Congress and the United States that torture shall be illegal at all times for any ideological reasons. And it is U.S. foreign policy to oppose torture.

The *Youngstown* case actually assumes that the case was justiciable and proceeded to the merits. In that case it was an action by the Chief Executive himself. And surely within the scope of employment for the President to take

those actions and yet the Court found that it was beyond his authority, it was unconstitutional for the President himself to order that seizure.

In *Committee of U.S. Citizens v. Reagan,* the plaintiffs there were directly attacking a law passed by [5] Congress, signed by the Executive, that it was clearly U.S. national policy. It was that policy that they were challenging. Whereas, in this case, we do not challenge the foreign policy of the United States.

JUDGE GINSBURG: Well, it seems – I may be wrong, but I thought there was an allegation in the complaint that the United States aided the Chilean quote terror.

MR. LLOYD: Yes, Your Honor.

JUDGE GINSBURG: So why – that sounds like it was the policy of the United States.

MR. LLOYD: Your Honor, it is our complaint that Kissinger acted outside of his scope of employment. But if this Court finds that he did, in fact, act within his scope of employment, we hold that these are actions which no sovereign may authorize. That if it was found by this Court that the sovereign did, in fact, authorize these actions that jus cogens norms prevent this – prevent an Executive from authorizing such things as torture. But we don't need to resolve that because the Executive and Congress have never authorized torture and there is no claim that it was ever U.S. national policy to aid and abet.

JUDGE GINSBURG: Well, if the Congress – suppose the Congress, as it did through resolutions and bills, pretty clearly establishes that it is contrary to the policy of the United States to use or facilitate others in the

use of [6] torture? And it is nonetheless, let us assume, the policy of a particular administration to do things that arguably are contrary to that, that arguably include torture, what is the policy of the United States in that circumstance?

MR. LLOYD: Well, I think in those circumstances that's – it's the kind of general policy claim that something is part of policy that the U.S. Supreme Court in *Hamdi* said cannot be used as a way to not examine the individual harms. The fact that there is a broad executive policy doesn't mean a court cannot examine whether individuals have been harmed.

JUDGE BROWN: But don't you have more than that here? Because, in fact, you have a certification from the Attorney General that the Secretary was actually acting within the scope of his employment.

MR. LLOYD: Yes, Your Honor.

JUDGE BROWN: You have some evidence that, in fact, the initial mandate for this came from the President himself. So I think it's beyond a general statement of policy. So I think the question is then what – how does it work when you say on the one hand, one part, one political department, the Congress, has enacted this statute? On the other hand, perhaps the Executive has given directions that are contrary to that.

MR. LLOYD: Your Honor, you are certainly correct that there is a certification here. We would dispute that [7] there is any directive from the Executive for these actions. The opposition would refer to a 1970 discussion that President Nixon had saying take all steps to remove Allende from power. But this case is not *Schneider*. You

cannot draw out a conversation in 1970 regarding preventing someone coming into power as authorization that in 1973 to 1976 you should engage in a policy of aiding and abetting torture. But even with that hypothetical, if there was a U.S. policy to aid and abet and torture, which we have not seen pled here, *Youngstown* says that even actions of the Executive are judicially reviewable, especially when they are directed contrary to the policy of Congress.

JUDGE BROWN: Okay. Well, let's follow up on that a little bit because if, in fact – what *Youngstown* said is the powers of the Executive may be at a low ebb when they come into conflict with the Congress. But does that mean that we just ignore them? I mean, the line between those two things has really never been firmly established. So is the question the power that Congress has to intrude on what the Executive does or is that itself a political question?

MR. LLOYD: Your Honor, I would say that, trying to follow – stick with your hypothetical, that in that case they found that even when the Executive himself was directly contrary to Congress' will that that was justiciable and ruled against him. You basically take the Executive's own [8] individual powers under its different articles and subtract from them, from what Congress has expressed at its will. It's very clear the will of Congress. And in *Youngstown,* the action the Executive took was passably, you know, legal, but the Executive could believe that it is legal. There is no way the Executive could believe that authorizing torture would be legal and we would submit that it is even below the third category because there is no clear authorization to an Executive Officer to engage in such a policy.

Now, even assuming –

JUDGE GINSBURG: Mr. Lloyd?

MR. LLOYD: Yes, Your Honor?

JUDGE GINSBURG: The statute provides that the Secretary of State is responsible for both conducting the business of the Department in such a manner as the President shall direct.

MR. LLOYD: Yes, Your Honor.

JUDGE GINSBURG: So if you're correct that the President's direction, if contrary to statutory requirement, must yield and is unlawful –

MR. LLOYD: Yes, sir.

JUDGE GINSBURG: – does it follow that Kissinger, or the Secretary, has acted unlawfully when his obligation is to follow the directions of the President?

MR. LLOYD: Yes, Your Honor, and I would submit that [9] it was actually the policy of the Executive as well from 1973 to 1976 to be opposed to torture. So there is not statement. You will see in the authorized duties of the Secretary of State, from which you quote, there is a long list of kind of the pro forma everyday activities of the Secretary of State – negotiating with diplomats, going to events, you know, kind of the run-of-the-mill of the Secretary of State, and then any other authorized duties the President shall submit to him. I would say that that means that we would need a direct tie, we would need an order from the Executive saying you shall participate in these things.

Because both the common law and the will of Congress are extremely clear here. Torture has been outlawed since the time of Magna Carta. So to say that a generalized conversation in 1970 should lead an Executive Officer in 1973 to 1976, even after Nixon is out of power, to believe that he could engage in these things, I don't believe that that section, directed – as other authorized as the President shall direct, would be that authorization.

JUDGE GINSBURG: Let me ask you this, if the TVPA claim is justiciable, am I correct in recalling that that requires that the defendant had been acting under color of foreign law?

MR. LLOYD: Yes, Your Honor.

JUDGE GINSBURG: So what possible grounds do you [10] have for claiming that Kissinger is acting under color of foreign law?

MR. LLOYD: The color of foreign law requirement of the TVPA is clearly governed by Section 1983. The legislative history in other courts that have looked at this clearly say that you look to Section 1983. What is the standard under 1983? It's willing participant. From the *Adickes v. Kress* and *Princz* cases, it's clear that a private individual, or someone acting as a private individual, cooperating, for example, as in the *Princz* case, with police officers is acting under the color of that law, under the law but under –

JUDGE GINSBURG: But in that case, and pardon me, as a general matter, does it not, asserting an authority, derive from that state?

MR. LLOYD: It's not required, Your Honor, that they assert the authority. The individuals in the *Princz*

case who took Schwaney, Goodman Chair Schwaney [PHONETIC SP.] aside on a highway and beat them to death weren't necessarily asserting that they were policemen or that they had the authority of policemen, they were willing participants with police officers in that engagement. So under color of foreign law, clearly the Chilean actors involved were under color of foreign law. They were –

JUDGE GINSBURG: I didn't know if that was clear or not. I thought, perhaps, they were in violation of their own [11] law.

MR. LLOYD: It is not legal under the law of Chile to torture people. There was no claim that the Chilean officers were pronouncing judicial verdicts when they were extrajudicially killing those person or when they were torturing them.

JUDGE GINSBURG: The claim is that they were nonetheless abusing their office.

MR. LLOYD: Well, they were officers. They were members of the DINA, the Chilean Secret Service. And I would submit, Your Honor, that if we are to find that Kissinger is within the scope of employment this would be a factual issue that should have been examined in the lower court in a factual hearing. It's clear reversible error for the court below to have said that scope of employment is a question of law. In the opinion, page 11, footnote 9, appendix page 170, the Court clearly says, "scope of employment for purposes of immunity is a question of law." This, clearly, is incorrect and in contrast with the rest of the jurisprudence of both this Circuit and the D.C. Circuit, which we look to.

In the D.C. Circuit, it says –

JUDGE GINSBURG: Wait a minute, I'm confused. This Circuit and the D.C. Circuit?

MR. LLOYD: I'm sorry. The D.C. State Circuit. I'm sorry. The D.C. State Circuit is what this Circuit looks to [12] for scope of employment in the agency –

JUDGE GINSBURG: Local law.

MR. LLOYD: Local law. Yes, Your Honor.

In the *Boykin* case, *Boykin v. District of Columbia,* the Court ruled it is a question of fact, scope of his employment is a question of fact, for the jury. In *Johnson v. Weinberg,* they reversed the Court below saying it was an error for the Court to take the question from the jury because it was a question of fact. In *Lyon v. Carey* in this Court, they said the case was probably won for the jury. And in *Kimbro v. Velten,* this Court said, "the certification," which is, Your Honor, reviewable by this Court and is challengeable by the plaintiffs, "the certification obliges the plaintiff to come, forward after reasonable discovery with evidence supporting his allegations as to scope and to the merits. If there is a material dispute, the Court must resolve it in an evidentiary hearing." I would emphasize the word "must."

JUDGE GINSBURG: The AG certification is prima facie evidence, correct? The defendant was acting within the scope of his employment.

MR. LLOYD: Yes, but –

JUDGE GINSBURG: So your burden is to dislodge that.

MR. LLOYD: It is our burden, Your Honor, but as they said in *Kimbro,* it is our burden after reasonable discovery with a hearing to prove our allegations as to he was [13] outside of the scope. In *Stokes v. Cross,* as Your Honor ruled, the plaintiff was not required to allege the existence of the evidence he might obtain through discovery. And in *Kimbro,* it said that the statutory scheme here does not treat certification as really having any particular evidentiary weight.

JUDGE GINSBURG: What would you be seeking in discovery?

MR. LLOYD: Your Honor, we would be seeking in discovery to depose both Defendant Kissinger and to depose Defendant Michael Vernon Townley, who has already had a default judgment held against him. We would be seeking documents.

JUDGE GINSBURG: Right, but what are you asking?

MR. LLOYD: We are asking for –

JUDGE GINSBURG: What are you asking in discovery of those individuals?

MR. LLOYD: We would be asking for information that would establish that Defendant Kissinger was doing exactly what we allege, aiding and abetting, acting jointly with Chilean actors that tortured our plaintiffs. Your Honor, the Court below intimated that we did not even allege that Kissinger ordered, authorized, supported, or encouraged these acts of torture. That is exactly what we allege –

JUDGE GINSBURG: But the problem is you have alleged [14] also that the United States did that.

MR. LLOYD: Yes, Your Honor.

JUDGE GINSBURG: Which brings the first allegation within the scope of employment.

MR. LLOYD: Your Honor, it is necessary sometimes to plead in the alternative. So it's clear that –

JUDGE GINSBURG: Is that the way it's structured?

MR. LLOYD: Your Honor, we have claims against the United States and against Defendant Kissinger. This case is against both for each of their particular actions. The CIA and the Department of State were intimately involved, but not through the will of Congress, not through funding that was authorized for these purposes.

JUDGE GINSBURG: Thank you, Mr. Lloyd. You have used all of your time. Had you sought to save some for rebuttal?

MR. LLOYD: Yes, two minutes for rebuttal.

JUDGE GINSBURG: We'll give you at least a minute of that.

MR. LLOYD: Thank you, Your Honors.

ORAL ARGUMENT OF ROBERT M. LOEB, ESQ.
ON BEHALF OF THE APPELLEES

MR. LOEB: May it please the Court, my name is Robert Loeb from the Department of Justice and I represent

the Appellees in this appeal, Dr. Kissinger and the United States.

[15] It is our position that the *Schneider* case is controlling in this matter. It arises from very similar claims brought by the same lawyers against Dr. Kissinger and the United States regarding the coup, supporting the coup in Chile, and this Court held that it was a non-justiciable political question. Hereto, we have the exact same sort of claims regarding supporting the coup in Chile. And so as to that aspect of the complaint *Schneider* is clearly controlling.

The other half of the complaint is supporting the resulting government after the coup. And this is even more clearly covered by the rationale of *Schneider.* And if you look at the allegations in their complaint, the allegations are even more clearly than in *Schneider* regarding policy decisions. If you look at pages 19 and 20 of the Joint Appendix, what they are accusing Dr. Kissinger of is acting as Secretary of State and supporting a regime, if you look at paragraph 68, and refusing to speak out against atrocities and still – the United States and Henry Kissinger said still reported the regime in Chile.

In paragraph 74, it says that they were still sympathetic to the regime, even though there were allegations of these human rights abuses. So as they say here, they, in their argument in their briefs, write it in a way suggesting that Dr. Kissinger somehow committed the torture himself. What they are really accusing Dr. Kissinger of, as Secretary [16] of State, is not criticizing sufficiently the resulting government after the coup. And that, clearly –

JUDGE ROGERS: [VOICES OVERLAP] pleading deficiency?

MR. LOEB: Well, is it possible to be a complaint here that wouldn't fall into a political question? Perhaps. But this complaint, clearly, is not just touching upon matters of foreign affairs but is basically an attack on the conduct of foreign affairs by the Secretary of State.

JUDGE ROGERS: In other words, I'm just trying to understand if there is any leeway for cause of action at all when it pertains to a government official in your view?

MR. LEOB: There may not be. I can't come up with every –

JUDGE ROGERS: If they had alleged that Dr. Kissinger had told General X, a Chilean general, to torture the plaintiff or the plaintiff's relatives, would that be enough?

MR. LEOB: I –

JUDGE ROGERS: Just as a pleading question.

MR. LEOB: In the pleading question? On *Schneider*, they alleged that Dr. Kissinger was aware that General Schneider was going to be kidnaped and was aware, or should have been aware, that it would result in his torture and his murder. So –

JUDGE ROGERS: Being aware that atrocities are [17] happening is a different, in my hypothetical, of an allegation [VOICES OVERLAPS].

MR. LOEB: And yours is an extreme hypothetical, which is far afield from here, but I would say looking at the rationale of China that said that in that case they are alleging extreme measures and that a court is not very

well positioned to decide whether those extreme measures were required under those circumstances or not, that that was a matter of national security, a matter of foreign affairs. And even if they are alleging that it was wrongful and that it ended up in extrajudicial killing and torture in the *Schneider* case, a court was not situated to second guess those, especially in the hindsight of 30 years.

JUDGE ROGERS: So, in other words, if the complaint pled we take no issue with U.S. policy, either in terms of a coup or in supporting the Allende government afterward. What we are focused on are the actions of one U.S. official and we make the following allegations. Does that get beyond *Schneider*?

MR. LOEB: It makes it a more difficult case than *Schneider*. I think you definitely –

JUDGE ROGERS: No, all I'm trying to understand is the Justice Department's position as to whether *Schneider* is a blanket cover for anything done by a U.S. official where the Attorney General certifies –

[18] MR. LOEB: No, Your Honor –

JUDGE ROGERS: – or where the line is drawn.

MR. LOEB: The Supreme Court and this Court says that as to questions, political questions, and nonjusticiability, you need to look at each case on their particular facts.

JUDGE ROGERS: I gave you a hypothetical.

MR. LOEB: And I don't think I can give a specific answer to that hypothetical without looking at,

you know, where you're saying that they particularly ordered it and –

JUDGE ROGERS: So even in my hypothetical that would still be insufficient under your – on your legal position?

MR. LOEB: It might be, Your Honor. And it's a much harder case than this case.

JUDGE ROGERS: If they had a video showing that he pulled a trigger?

MR. LOEB: If there was a –

JUDGE ROGERS: In other words, is it the Department's position that Congress could not have intended that the Torture Victim Protection Act would apply to a U.S. official, no matter how egregious his action, where he's in a position such as National Security Advisor or Secretary of State?

MR. LOEB: Well, clearly, it only applies to someone acting under color of foreign law. And the Secretary of State [19] in carrying out the U.S. foreign policy is going to be almost always acting under color of U.S. law and not – and to the extent where U.S. officials are involved in violence abroad, as you're suggesting, you have to recall if the United States decides that there is a regime abroad which is a threat to the United States, we, of course, can use our military power to commit acts of killing and violence, which, of course – you know, and the question of how much force to use and whether to use it or not is a quintessential political question.

JUDGE GINSBURG: This statute wouldn't apply only to senior officials, correct?

MR. LOEB: Of course not, Your Honor.

JUDGE GINSBURG: It applies to everyone. So a rogue agent in the field who is turned and acts in concert with the foreign government's intelligence service and substantively violates the TVPA would seem to fit the bill.

MR. LOEB: Fit the bill? He would be within the statute, Your Honor?

JUDGE GINSBURG: Fits the bill of acting under color of foreign law.

MR. LOEB: It might be in that circumstance. Because the question is under the *West v. Atkins* analysis, if one was to buy into the 1983, is whether he's possessing his authority by virtue of Chilean law and where he's acting as a rogue authority and has no role regarding what he's doing in [20] Chile under U.S. law, it may be that he's deriving his authority in that context.

JUDGE GINSBURG: Well, if he's a station agent at the embassy in Chile, okay, and he's authorized there to act on behalf of the CIA, but instead he starts acting, as I said, in concert with the agents of the Chilean government, going out with them and identifying people to be picked up and tortured or what have you, as you said, facts matter, right?

MR. LOEB: The facts matter, but sometimes those factual inquiries will themselves derive into sort of political question inquiries about whether a foreign intelligence agency was acting within the scope of his assignment or under – and what was the level of cooperation with another foreign government. There are a lot of –

JUDGE ROGERS: If it's a question of fact, then are the plaintiffs entitled to some limited discovery here?

MR. LOEB: In a wildly different hypothetical.

JUDGE ROGERS: No, with this complaint that they have now.

MR. LOEB: With the complaint here, they are just alleging that Henry Kissinger didn't sufficiently criticize the government of Chile –

JUDGE ROGERS: No, in fairness, Mr. Leob, they allege more than that.

MR. LOEB: In, in, in –

[21] JUDGE ROGERS: So he's acting jointly.

MR. LOEB: In acting jointly, but all of the – I mean, they have to in their complaint give a – they plead facts in their complaint and those facts all are about Henry Kissinger supporting the regime, reluctant to speak about against the regime.

That in here it's a very telling thing, the support of the dictatorship, this is paragraph 72 on page 20 of the Joint Appendix, is illustrated. How is it illustrated? Because the United States government continued military assistance to Chile. You know, Henry Kissinger wasn't personally selling military arms to the government there. It was a U.S. policy to support the regime, which they are accusing him of aiding and abetting, and selling arms to that regime. So, you know, with due respect, Your Honor, that's the allegations of the complaint here. And this is an area fraught with hypotheticals, but the complaint here

clearly falls within, even more so, within the scope of *Schneider* than *Schneider* itself.

I'm happy to address any questions that you have, including the question you asked for supplemental briefs on.

JUDGE GINSBURG: Well, I want to follow up a little bit on the question that Judge Brown raised earlier on. At least it was implicit in what she was saying, which is to ask whether the Congress – when the Congress has, by statute, [22] laid down a mandate for foreign policy. Does that alter the line between – or alter the precedence of authority in any way?

MR. LOEB: Well, this Court, the *Crocket* case dealt with a similar situation where it was the case being brought saying you are basically violating the War Powers Act and a statute we said which you could no longer support this regime abroad without a particular declaration of emergency, which hasn't taken effect. And this Court said in *Crocket* it was a political question raised as to whether that we could continue to have military support for that regime or not or whether the War Powers Act was violated or not.

So, I mean, it would depend on the particular statute and the bond, but as this Court said in *Schneider*, these type of political disputes about how much force to use, how much support to another regime to give are matters for the political branches. And there are political remedies. There are investigations. Congress can cut off funds. And as this Court noted, there is the even threat of impeachment which can be brought. So there are political remedies when there are these political checks.

And it's hard to imagine also a situation where that kind of check on the Executive would be subject to private enforcement. But if you had a statute that was subject to private enforcement, you know, it might be possible. But I [23] think the *Crocket* case gives it a good analysis of how must a simple restriction on the Executive about when and how to use force is generally not subject to political oversight, judicial oversight.

JUDGE BROWN: What if you don't have a simple restriction but what you have is really a conflict? Because here what's being said is on the one hand this was U.S. policy, this person was acting within the scope of his employment. What plaintiffs are saying is but, and the way the trial court analyzed this here was to say, well, there might be Westfall immunity but, perhaps, the TVPA falls into the exception. So what you really have is a conflict between the two branches, perhaps. And if you have that, how do you resolve it? I mean, does that remain a political question or is it justiciable but difficult?

MR. LOEB: It may be nonjusticiable – let me just get to the conflict, as you asserted here. They say it's a conflict because there is a U.S. policy against torture and Henry Kissinger had a policy in favor of torture. Again, his complaint says the policy was supporting a regime which they say engaged in torture and human rights abuses.

JUDGE BROWN: Yeah, but I want to get beyond. I understand you think their complaint is deficient and you think that what they've said is not, but what I want you to tell me is what happens if you've got a sufficient complaint [24] here because the basis of the Political Question Doctrine and the Court's restraint in that area is based in part on separation of powers, okay? I

mean, that's the justification for it. So if you have, in fact, a conflict between those political departments, what does the Court do?

MR. LOEB: Well, there is a conflict, as far as policy and how much force to use, especially in an area of foreign affairs, it is a matter of between the political branches, which this Court in *Schneider* I think wisely said it was a matter that the court must leave to the political remedies. And I think that's the short answer.

But as to the – for the Torture Victim Protection Act, there is a remedy there that is not subject to Westfall immunity because it is a cause of action. But it is still subject to the Political Question Doctrine, where the acts here alleged are ones of foreign policy, about whether and how much to support a regime which they allege was engaging in human rights abuses.

For example, under their theory, if someone alleged there were human rights abuses in Iraq by the new regime there, we should basically stop supporting that regime as a matter – it would be – the officials who were doing that would be subject to liability in the future, personal liability in the future. The question of whether and how to support a regime, which has some human rights abuses, and [25] there are plenty of regimes around the world with spotty human rights records, but we're still trying to build relations with or we have national security interests in building relations with them and trying to coax them to having better human rights [INDISCERNIBLE]. And to say that plaintiffs can come to court and litigate our relationship with those countries, litigate whether we should have been more strongly objecting to their activities, whether we should cut off all aid to them because

there were these allegations of human rights abuses. These are all matters a court just simply cannot assess, Your Honor.

JUDGE ROGERS: So that excludes the rogue official as well?

MR. LOEB: I think Chief Judge Ginsburg's hypothetical, you know, it depends on how rogue he is and outside his scope of authority. At some point we're going to say that he was not acting within the scope of his authority and that he was just acting alterverous [PHONETIC SP.] and there won't be even a scope certification in that regard.

JUDGE ROGERS: Again, that's basically a political decision by the Attorney General.

MR. LOEB: And under the *Haddon* case, you look, as far as the scope certification, at the allegations in the complaint and whether there is, on the face of the complaint, it's within the scope of the authority. And here, as far as [26] the Secretary of State, all of the factual allegations, if taken as true, are all about his actions, acting as Secretary of State, speaking out one way or the other about this regime, whether in support of it or not sufficiently condemning it or supporting military aid to it.

So here, taking the facts on their face, clearly, a court has the authority to say on this face the scope certification was correct and, similarly, into the political question you can say, looking at the face of the complaint, his allegations fall within that realm. Thank you.

JUDGE GINSBURG: Thank you, Mr. Loeb. Lloyd, you have a minute.

REBUTTAL ARGUMENT OF AARON LLOYD ON BEHALF OF THE APPELLEES

MR. LLOYD: Your Honor, present Counsel referenced the *Haddon* case. The *Haddon* case, there was no factual dispute because the facts below did not dispute the facts. And the record so states that is, in fact, what I would say is the origin of the court below's error. That they said because the parties did not dispute the facts it is, therefore, a conclusion of law.

The Political Question Doctrine does not bar this case. The *Baker* case specifically says the PQ label has an ability to obscure the need for case by case inquiry. And the court below ably discussed the Political Question Doctrine and [27] decided not to rely on it, in part because of the scattered, disorganized nature of the Political Question Doctrine.

The *Crocket* case is clearly distinguishable. It's a war powers issue. We do not challenge such clear executive powers. The court below and the government are both picking and choosing from our complaint to find the things that they want to say we allege. We have alleged aiding and abetting and acting jointing in torture.

I see that my time has expired.

JUDGE GINSBURG: Thank you, Mr. Lloyd. Welcome back, when you are admitted to the bar. Mr. Lloyd and Mr. Loeb, thank you, the case is submitted.

(Recess.)

[28] CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Debra L. Blum
DEPOSITION SERVICES, INC.

June 15, 2006